BEFORE THE SURFACE TRANSPORTATION BOARD

226838

Finance Docket No. 33556, Sub No. 5

CANADIAN NATIONAL RAILWAY, GRAND TRUNK CORPORATION, GRAND TRUNK WESTERN RAILROAD COMPANY INCORPORATED – CONTROL – ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, etc.

REPLY OF THE AMERICAN TRAIN DISPATCHERS ASSOCIATION TO PETITION FOR REVIEW OF AN ARBITRATION AWARD

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REPLY OF
THE AMERICAN TRAIN DISPATCHERS ASSOCIATION
TO PETITION FOR REVIEW OF ARBITRATION AWARD

The Parties

The Canadian National Railway Company ("CN") is a Canadian corporation doing business in the United States on lines of the former Illinois Central Railroad ("IC"), the Wisconsin Central Railroad ("WC"), and the Grand Trunk Western Railroad ("GTW"). The American Train Dispatchers Association (hereafter "ATDA") is the exclusive collective bargaining representative for the employees of both the GTW and WC in the craft or class of train dispatchers. The GTW dispatchers work at Troy, MI; the WC dispatchers are at Homewood, IL. The train dispatchers employed on the former IC are represented by the Illinois Central Train Dispatchers Association ("ICTDA"), which is not affiliated with ATDA. They also work at Homewood. There are presently 17 active GTW train dispatchers, 26 active WC train dispatchers, and 37 active IC train dispatchers.

There are collective bargaining agreements in place between ATDA and GTW and between ICTDA and IC. ATDA and WC are in the process of negotiating an initial CBA.

Prior to acquiring IC, CN operated in the United States through its subsidiary GTW. On May 21, 1999, this Board authorized the acquisition by CN and GTW of control of IC and the integration of CN and IC rail operations. *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company, etc.,* 4 STB 122 (1999) (Decision No. 37). As outlined in its decision, the Board conditioned its approval of this transaction on compliance by the carriers with the *New York Dock* Conditions.[1] 4 STB at 128, 144. As a result, any transactions which CN or GTW undertake pursuant to the STB's grant of authority to purchase the GTW are subject to Article I, Section 4 of the *New York Dock* Conditions.

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[1] *New York Dock Ry. - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979)("*New York Dock*"), *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

The Events Leading Up To The Arbitration

On February 3, 2009, CN served notice on ATDA of the carrier's intent to abolish all 16 GTW train dispatching positions at Troy, MI, establish 10 new train dispatching positions at Homewood, IL, and thereafter have all train dispatching on former GTW lines handled by the newly created positions at Homewood. Specifically, the carrier's Notice stated:

> It is necessary to consolidate the train dispatching operation of the [GTW] and the [IC] into one location. The consolidation will result in the abolishment of sixteen (16) GTW dispatcher positions at Troy, Michigan. Ten (10) dispatcher positions will be established at Homewood, Illinois. The reason for the consolidation is to provide increased efficiency and better utilization of the dispatchers at Homewood.

Petition for Review of an Arbitration Award ("Petition"), Exhibit D.

The parties were unable to negotiate an implementing agreement. The chronology and description of their attempts were outlined to the Arbitrator in their respective submissions.[2] It reveals that when ATDA presented the Carrier with a counter to its opening proposal, the Carrier refused to discuss it, withdrew the original proposal, demanded arbitration and offered nothing more than what is contained in Sections 9 and 12 of *New York Dock*.

ATDA viewed this as a blatant attempt to tie the hands of an arbitrator. Faced with such regressive bargaining, ATDA reiterated what was essentially its previous proposal, the same proposal it later asked the Arbitrator to adopt as the most reasonable and most consistent with purposes of *New York Dock*. The obvious purpose of the bargaining requirement in Section 4 is that the parties narrow their differences in an effort to arrive at an implementing agreement. The record proved that the Carrier did not abide by this requirement.

The evidence before the Arbitrator showed that the Carrier was not about to undertake an immediate merging of the GTW and IC rail traffic control systems. Rather, the transaction was merely moving the GTW control system from Troy to a building at Homewood where IC and

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[2] The Carrier's version of the events is set forth in the Declaration of Cathy Cortez which is Exhibit C to CN's Petition. The Declaration of David Volz, which set forth ATDA's position, was also filed with the Arbitrator and is Exhibit A hereto.

WC dispatchers already work. When that happens all of the dispatchers would be under one roof, but they would not be controlling a single transportation system. Rather, the Carrier would continue to operate three separate rail systems, only now they would be operated out of one facility rather than two.[3]

THE ISSUES IN DISPUTE BEFORE THE ARBITRATOR[4]

The parties selected Arbitrator Don A. Hampton to resolve their differences over hat terms should be included in the implementing agreement. Each side submitted proposed implementing agreements to the Arbitrator. Exhibits B and C to this Reply.

ATDA asked the Arbitrator to impose an implementing agreement providing that (1) employees who transfer to Homewood to work positions that dispatch trains over GTW trackage get priority over existing employees at Homewood to bid positions that perform those functions; (2) employees transferring to Homewood remain on a separate seniority roster of employees handling dispatching over GTW trackage; (3) employees whose positions at Troy are abolished but who are not awarded positions at Homewood initially retain rights to bid on vacancies that

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[3] ATDA told the Arbitrator that it could not tell whether this was to keep the ICTDA train dispatchers independent from ATDA, but that, under the representation processes of the Railway Labor Act, representatives are certified for entire rail systems and the National Mediation Board will only extinguish a representative's status when a system no longer exists. The Union explained that it is to CN's advantage to delay the day when the NMB can declare a single system exists until after this transaction occurs, so the carrier can eliminate jobs covered by the ATDA agreements and certifications. Presently, the ATDA-represented GTW and WC dispatchers outnumber the ICTDA-represented dispatchers 43-37. When the proposed transfer of work occurs, there will be seven fewer ATDA-represented active employees, assuming all 10 positions being transferred to Homewood are filled by former Troy –based dispatchers.

Furthermore, ATDA explained that CN currently has an agreement with ICTDA that, unlike the GTW-ATDA agreement, contains no union security provision and provides no wage increases for five years, terms that the Carrier apparently believes are more advantageous to management.

[4] There was no disagreement between the parties that the positions to be created at Homewood would be posted and subjected to seniority-based bidding by the Troy dispatchers; that every GTW train dispatcher would be eligible for a displacement or dismissal allowance under *NYD* as a result of the consolidation; that employees entitled to benefits under another job security arrangement would be required to elect which benefits to receive; and that there be no pyramiding of benefits.

later occur at Homewood in positions dispatching trains over GTW trackage and be able to move to take those positions on the same terms and conditions available to those GTW employees who successfully bid the positions initially; (4) GTW train dispatchers who exercise seniority to obtain a clerical position[5] be considered eligible for displacement allowances in accordance with Article I, Section 5 of *New York Dock*[6]; (5) the Carrier provide free employment assistance for the spouses of the relocating train dispatchers; (6) the GTW train dispatchers who move to Homewood receive 10% pay increases in recognition of the higher cost of living there; (7) transferring employees be allowed five days with pay to locate a new residence at Homewood, and related travel expenses; (8) the Carrier offer eight separation allowances for Troy dispatchers as an alternative to moving; and (9) transferring employees may opt to accept lump sum monetary relocation packages in lieu of the moving and real estate provisions in *NYD* Sections 9 and 12. Exhibit C.

The Carrier took the position that the Arbitrator should (a) provide for the transfer of up to ten dispatchers to Homewood where they would be dovetailed with the ICTDA-represented dispatchers (but not with the WC dispatchers) and work under the ICTDA agreement, (b) allow those whose seniority was insufficient to obtain a Homewood job to work as clerks at Troy, (c) allow existing Homewood employees to claim any new positions not filled by Troy dispatchers, and (d) include references to NYD Sections 9-14 to address all relocation and income protection issues. It also argued that ATDA's proposals were beyond the Arbitrator's jurisdiction. Exhibit B.

ICTDA did not submit a specific proposal; it urged that the Arbitrator not affect the relationship between the ICTDA's members and the Carrier in his award.

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[5] Many of the Troy dispatchers came to dispatching from the clerical craft and retain seniority under GTW's agreement with the Transportation-Communications International Union, which represents that craft.

[6] Train dispatchers generally earn more than clerical employees. The record showed that the annual base pay of train dispatchers ($ 75,176) is 50% more than GTW pays clerks ($ 50, 571).

Following the receipt of prehearing submissions, Arbitrator Hampton conducted a hearing on November 10, 2009. He requested the filing of posthearing briefs, which occurred on December 4, 2009, and posthearing replies on December 18, 2009. He issued his Award on February 1, 2010.

THE ARBITRATOR'S AWARD

In his Award, Arbitrator Hampton described the proposed transaction, the positions of the parties, the provisions of *NYD* Article I, Section 4, and his responsibility. He explained that "as it is evident that the transaction will result in employees being displaced or dismissed and forces being arranged, so the Arbitrator must find an appropriate[] basis for the selection of forces and assignment of Employees to perform the GTW work being transferred to Homewood." Award p. 9. He found that he would have to "consider [the] working agreement, seniority, prior rights and industry practices as he formulate[d] his decision." *Id.* at 10.

The Arbitrator then explained why he did not believe the Carrier had carried its burden to support the dramatic agreement changes that it sought in its proposal.

> The Board at this time is unconvinced that it is a necessity to merge the duties of the GTW, IC and WC Dispatchers to promote the efficiencies as envisioned by the Control Transaction. The Carrier has not substantiated that efficiencies would be non-existent should the GTW Roster be maintained and the ATDA Collective Bargaining Agreement remain in effect for those GTW Dispatchers transferring from Troy to Homewood.
>
> There is no doubt that in the future, with changing technology and enhanced training methods that what the Carrier envisions will not only be possible, but common. On this issue the ATDA has been more convincing. The ATDA will be permitted to perform the duties at Homewood as they previously performed on territories covered by GTW Dispatchers.

Id. He then found that while both parties sought to blame the other "in their inability to reach a bargained implementing agreement," and "the bargaining process left much to be desired," he would use both their proposals to craft an agreement. *Id.*

The Agreement the Arbitrator wrote provides for the Carrier to abolish 16 train dispatcher positions at Troy and transfer their work to Homewood, where 10 new positions will be created, provided that if more positions are needed to do the transferred work, they will be offered to

those employees remaining at Troy. Agreement, ¶s 1-2, 4. It provides for the Troy employees to make irrevocable decisions whether to transfer, accept one of six separation allowances, or accept a clerical position at Troy, either by exercising seniority, if they have it, under the GTW/TCIU agreements or by accepting a Carrier offer to work as a clerk. Agreement, ¶ 3, 12. These choices are to be made in seniority order. Agreement, ¶4, 12. The employees who are unable to obtain dispatcher positions at Homewood in the initial round and who accept clerical jobs are to be considered displaced employees with rights to bid on vacancies at Homewood as they occur. Agreement, ¶s 4, 9. The employees who transfer to Homewood "shall remain subject to ATDA representation and all agreements, including all national agreements, in effect between the ATDA and GTW governing wages, rules and working conditions, subject to the modifications contained herein, until such time as a single agreement is reached covering all ATDA represented train dispatchers." Agreement, ¶ 5.[7] The Agreement provides for transferring employees to possess prior rights to the ten positions being created at Homewood. Agreement, ¶ 6. Finally, the Agreement the Arbitrator imposed provides for several options for transferring employees in lieu of the benefits provided in *NYD* Sections 9 and 12: those with homes may receive $10,000 over 15 months plus $10,000 if they sell their Troy home at fair market value and buy a new one in Homewood within two years (Award Att. (B)); those who rent may receive $1,300 monthly to cover rental costs for 24 months (*Id.*); and all may take four days with pay to find new residences in Homewood, with $500 to cover expenses associated with these house-hunting trips (Award Att. (B)(1)).[8]

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[7] The Arbitrator did not determine that CN could never merge all of the train dispatchers under one agreement. Rather, based on the record evidence, he decided that that merger was not necessary to the transaction until all employees in the same classification are in the same office and a complete integration of operations (something the Carrier has not yet proposed) can be accomplished. The essence of his Award is that the railroad has not proven that it is necessary to do away with the ATDA agreement before that time.

[8] The Agreement also includes standard language regarding no duplication of benefits (¶ 7), the election of benefits between it and other existing arrangements (¶ 8), preservation of such other arrangement benefits without pyramiding (¶ 10), and dismissal allowances for employees (continued...)

In creating the imposed Agreement, the Arbitrator rejected outright ATDA's proposals that the implementing agreement provide that the rates of pay in effect for GTW train dispatchers at the time of the relocation should be increased by 10% and that the carrier should provide employment assistance for the relocating train dispatchers' spouses. He also rejected the Carrier's position that, despite its earlier bargaining proposals that would give the employees additional options, no benefits other than those explicitly provided in *NYD* Sections 9 and 12 be made available.

ARGUMENT

THE ARBITRATOR'S AWARD SHOULD BE AFFIRMED.

"The New York Dock conditions do not prescribe, and they could not possibly prescribe, a one-size-fits-all standard respecting implementation of particular transactions." *CSX Corp. - Control - Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub No. 22), 3 STB 701, 1998 WL 661418 (Service Date Sept. 25, 1998) at *11. CN's Petition challenges the Hampton Award because it does not apply a "one-size" approach and accept its proposed implementing agreement as gospel. We show below why the Board should not find it appropriate to accept the Carrier's Petition and, even if it does, should affirm the Award in all respects.

A. The Applicable Standards of Review

1. The *Lace Curtain* Principles

The principles applicable to review of *New York Dock* arbitrator's awards are set forth in *Chicago & N.W. Transp. Co.-Abandonment,* 3 I.C.C.2d 729 (1987) ("*Lace Curtain*"), *aff'd sub nom. Int'l Bhd. of Elec. Workers v. ICC,* 862 F.2d 330 (D.C.Cir.1988). Under the *Lace Curtain* standard for review of an arbitration award, the Board generally defers to an arbitrator's decision declines to grant review in the absence of "recurring or otherwise significant issues of general

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[8](...continued)
who are unable to hold a job (¶ 11), and dispute resolution (¶ 15).

importance regarding the interpretation of our labor conditions." *Id.* at 736. A party seeking review of an arbitration award bears a considerable burden in satisfying this standard. Not only must the award in question involve an issue that is not unique to the particular parties, it also must have an impact felt beyond that property.

In addition the ICC explained in *Lace Curtain* that particular benefits need not be "specifically provided for" in the imposed Conditions to be permissible; the Commission (now STB) would approve them if they are "within the context and spirit" of the Conditions. *Id.* at 736. Thus, in *Lace Curtain*, an arbitrator's awarding of additional sums to set up a household (a so-called "lace curtain allowance"), reimbursement of a real estate commission and mortgage interest, and judgment-type interest to compensate for delay in payment was sustained by the Commission. The ICC accepted these kinds of benefits because an arbitrator applying the Commission's labor protective conditions is "[g]iven the leeway... to consider industry practice so long as [he] is interpreting and applying the [Conditions] and not dispensing [his] 'own brand of industrial policy.'" *Id.* Similarly, *Lace Curtain* explains that it is not beyond the arbitrator's authority to select which party's position best reflects the purpose behind the imposed conditions. *Id.* at 737.

Thus, the arbitrator's authority is not so circumscribed that nothing more than the explicit language of the *NYD* Conditions may be incorporated into the implementing agreement. As arbitrator John LaRocco explained in one of the awards the Carrier relies on here, an implementing agreement imposed in Section 4 arbitration not only should encompass those benefits explicitly described in the Conditions, it also may include "benefits that draw their essence from the New York Dock Conditions without being specifically enumerated therein." *Norfolk & Western Ry. Co. and Brotherhood of R.R. Signalmen* (LaRocco 1989) (Exhibit D), p. 24.

Lace Curtain contains several distinct requirements: First, it requires a showing that an arbitrator's award involves "recurring or otherwise significant issues." 3 I.C.C.2d at 736.

Second, it requires a showing that the recurring or otherwise significant issue be of "general importance regarding the interpretation of our labor conditions." *Id.* Then, "[a]wards are not vacated because of substantive mistake, except when there is egregious error, when the award fails to draw its essence from the labor protective conditions, or when the arbitrator exceeds the specific limits on his authority." *ATDA v. CSXT*, 9 I.C.C.2d at 1130-31 (1993) (citing *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982)(footnote omitted)). "Egregious error means irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." *Id.*

The Commission concluded in *Lace Curtain* that its standard of review is meant to be consistent with Supreme Court's "*Steelworkers Trilogy*" of cases.[9] *Id.* at 736. They hold that "an arbitrator's decision on the merits and his interpretation of the collective bargaining agreement are to be given extreme deference, even though a court could interpret an agreement differently." *Lace Curtain*, 3 I.C.C.2d at 735 (citing *Loveless v. Eastern Airlines, Inc., supra*).

Lace Curtain itself considered an arbitration award involving the *Oregon Short Line R. Co. -Abandonment- Goshen*, 360 I.C.C. 91 (1979)("*Oregon III*"), which were imposed in that case to protect employees affected by the Chicago and North Western Transportation Company's abandonment of several rail lines. The ICC reviewed the award to determine whether it was based on a proper interpretation of these standard employee protection conditions. In that dispute, the IBEW maintained that a displaced electrician was entitled to compensation for three items related to moving expenses and losses incurred from the sale of his home pursuant to Article 1, Sections 9 and 12 of the *Oregon III* conditions. Finding that the displaced employee was entitled to the amounts sought, the arbitration panel sustained the IBEW's claim, which the carrier petitioned the Commission to overturn.

After the ICC established that it had jurisdiction to review the award, and that review was

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[9] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

warranted under new standards, the Commission upheld the award, finding that it did draw its essence from the *Oregon III* protective conditions. The Commission specified, however, the limited nature of its review:

> This is not to say that we would conclude that the Board's denial of any of these three items would be in error. Put another way, so long as the Board is interpreting and applying the *Oregon III* conditions and not dispensing its "own brand of industrial policy"... we would not object to the Board's granting *or* denying awards on these three particular issues.

3 I.C.C.2d at 736 (emphasis in original).

When the case was presented to the U.S. Court of Appeals for the District of Columbia, the Court further elaborated on the heavy burden a party must overcome in order to establish that the agency should overturn an arbitration award under *Lace Curtain*:

> Since [*Lace Curtain*] the Commission has employed a sliding scale of deference. An arbitrator's judgments about matters of evidence and causation are treated with deference. An arbitrator's interpretations of Commission regulations and views regarding transportation policy are subject to more searching review. *See, e.g., CSX Corp.-Control*, 4 I.C.C.2d 641, 648 (1988); *Lace Curtain*, 3 I.C.C.2d at 736. *See also Brotherhood of Maintenance of Way Employees v. ICC*, 920 F.2d 40, 44-45 (D.C.Cir.1990); *Employees of the Butte, Anaconda & Pacific Ry. v. United States*, 938 F.2d 1009, 1013-14 (9th Cir.1991), *cert. denied*, U.S. 112 S.Ct. 1474, 117 L.Ed.2d 618 (1992).

Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 812 (D.C. Cir. 1993).

Subsequent cases have fleshed out the circumstances in which *Lace Curtain* review is appropriate. For example, in *Delaware and Hudson Co. - Lease Trackage Rights - Springfield Terminal Ry. Co.* ("*D&H - Springfield Terminal*"), Finance Docket No. 30965 (Sub-No. 4), 1994 WL 464886 (I.C.C. 1994), the Commission agreed to review an arbitration award stemming from a dispute that arose pursuant to its approval of a series of transactions allowing Guilford Transportation Industries, Inc. ("Guilford") to restructure its operations. This included allowing the Springfield Terminal Ry. Company ("ST") to conduct Guilford's rail operations, including those of the Boston and Maine Corporation ("B&M"), a Guilford subsidiary. In implementing these transactions, Guilford abolished all B&M train dispatcher positions and offered the affected employees positions as nonagreement ST train operations managers. Two of the former dispatchers refused the offered employment and filed claims for separation allowances, which the

carrier denied based on its position that the employees "fail[ed] without good cause to accept a comparable position" and were thus not entitled to the allowances under Article I, Section 6(b) of the Mendocino Coast conditions. *Id.* at *6, n.4.

The arbitration board (David Twomey, neutral) issued an award sustaining the claims, finding that the ST train operations manager positions were not comparable to the abolished train dispatcher positions because although the skills and responsibilities of the two positions were comparable, the working conditions were not.

In deciding to review the award over the objection of the ATDA, which represented the former B&M dispatchers, the ICC held:

> We accept administrative review of this arbitration decision because it involves a dispute under the Commission's labor protective conditions imposed in D&H Lease, and raises a potentially significant issue of general importance regarding the interpretation of a labor protective condition that rarely has been addressed by the Commission. Rather than resolving any dispute about facts or evidence, arbitrator Twomey, in his decision, is interpreting the term "comparable position" in Article I, section 6(b) of the Mendocino Coast conditions. Because of the lack of a definitive Commission interpretation of the comparable employment requirement in those conditions and the paucity of arbitral decisions on the subject, it is appropriate and consistent with Lace Curtain for the Commission to review the award under our regulations at 49 CFR 1115.8.

Id. at *4. The Commission went on to affirm the Twomey Award, concluding there was no showing of egregious error, that it did not fail to draw its essence from the labor protective conditions, or that the arbitrator exceeded the scope of his authority. *Id.* at *5.

In *American Train Dispatchers Ass'n v. CSX Transp. Inc.* ("*ATDA v. CSXT*"), Finance Docket No. 28905 (Sub-No. 24), 9 I.C.C.2d 1127 (1993), the Commission agreed to review an arbitration award in a dispute involving CSXT's consolidation of its train dispatching functions following several mergers approved by the Commission and subject to the *New York Dock* protective conditions. The carrier had excluded from its calculation of dispatchers' average monthly compensation "extraordinary overtime hours and associated earnings" that dispatchers received due to manpower shortages and training needs associated with the consolidation. ATDA objected and progressed the matter to an Article I, Section 11 arbitration committee. The union argued that the carrier's method of calculation violated Article I, § 5(a) of the *New York*

Dock conditions, which states a displacement allowance is to be calculated based on the "total compensation received" by the affected employee in the previous twelve months. The arbitration committee rejected ATDA's claim based on a line of arbitral authority excluding such overtime from "total compensation," and based on its finding that this term is "inherently ambiguous." *Id.* at 1131. The ICC granted ATDA's petition to review the award, agreeing with ATDA's position that "this case is appropriate for appellate review... because of the lack of a definitive Commission interpretation of the 'total compensation' requirement of article I, § 5(a) and inconsistencies between arbitral decisions on the subject." *Id.* at 1130 (footnote omitted).

In *Wisconsin Central Ltd. - Purchase Exemption - Soo Line R.R. Co.*, Finance Docket No. 31922 (Sub-No. 1), 1995 WL 226035 (I.C.C. 1995), the Board agreed to review an arbitration award interpreting a provision in the *New York Dock* conditions in a dispute that arose after Wisconsin Central Ltd. acquired Soo Line's Ladysmith Line. The dispute involved whether a carrier must provide "test period average" earnings information to affected employees upon request, or only upon proof that an employee has been placed in a worse position as a result of the transaction. A Section 11 arbitration committee held that job abolishment alone does not mean an employee is placed in a worse position. According to the committee, only after an employee has exercised seniority and displacement rights can it be determined whether an employee was adversely affected. The Commission agreed to review the award, "find[ing] that the award involves an element potentially present in almost all transactions in which the agency's conditions are imposed, the preparation and delivery of TPAs. Accordingly, our review of the award is proper under that aspect of our standard of review." *Id.* at *5.

The distinctions between these cases and the instant dispute are obvious. In each of these cases, the ICC agreed to exercise its review authority in order to interpret standard provisions in labor protection conditions imposed in many transactions, such as the "comparable provision" requirement from the *Mendocino Coast* conditions (*D&H - Springfield Terminal*), and the method of calculating TPAs and requirement to furnish TPA information under the *New York*

Dock conditions, (*ATDA v. CSXT* and *Wisconsin Central*). Here by contrast, no generally applicable provision of the *New York Dock* conditions is involved in the dispute. Rather, what put the parties at odds, and what Arbitrator Hampton's Award resolved was the particular terms to be included in the implementing agreement, based on the particular nature of this transaction.

CN's arguments amount to no more than a disagreement with how Arbitrator Hampton applied *New York Dock* to the proposed transaction. While Arbitrator Hampton's application of *NYD* certainly is important to *these parties*, it cannot be said that it is of *general* importance, as required by *Lace Curtain*.

2. The standards applicable to carrier proposals to override existing agreements.

It has been plain at least since the 1990 decision of the Interstate Commerce Commission in *CSX Corp. - Control - Chessie and Seaboard C.L.I.*, 6 I.C.C.2d 715 (*Carmen II*) that overriding existing collective bargaining agreements is not simply the natural consequence of any STB-approved transfer of work. *Carmen II* established "that CBAs and the RLA should not be overridden simply to facilitate a transaction, but should be required to yield only when and to the extent necessary to permit the approved transaction to proceed." *CSX Corp. - Control - Chessie and Seaboard C.L.I.*, 3 S.T.B. 701 (1998) ("*Carmen III*") (slip op., p. 12). This Board later confirmed that *New York Dock* arbitrators "are free to make whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law." *Carmen III* - slip op., p. 19 (quoting *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 89 (1998)). There is no "one-size-fits-all standard respecting implementation of particular transactions." *Id.*

Carmen III holds that the necessity requirement is a "crucial limitation [that] restrict[s] CBA modifications that can be effected by an arbitrator under section 4." *Id.* p. 24. "[A] CBA override can be effected only where there are transportation benefits of the underlying transaction; it cannot be effected if the only benefit of the modification derives from the CBA

modification itself." *Id.* p. 26. The Board has made clear that a carrier proposing a CBA override must demonstrate with "reasonable particularity" the changes that are "clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities" – "arbitrators should not assume that all pre-transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purpose of the transaction." *Id.* at 27 (quoting *Fox Valley & Western Ltd. - Exemption Acquisition and Operation - Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company (Arbitration Review)*, Finance Docket No. 32035 (Sub-Nos. 2-6) (1995)). "This 'necessity' finding is not optional; pre-transaction labor arrangements cannot be modified without it." *Fox Valley* (slip op. at 2) (citation omitted).

The Board has explained that a finding that an agreement override is necessary to effectuate a transaction is "a factual finding to which [the Board] must accord deference to the arbitrator under our Lace Curtain standard of review"and will be reviewed "only if the arbitrator committed egregious error." *Union Pac. Corp., Union Pac. R.R. Co., and Missouri Pac. R.R. Co., - Control and Merger - Southern Pac. R. Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp. and the Denver & Rio Grande W. R.R. Co.*, Finance Docket No. 32760, slip op. at 5 (Service Date June 26, 1997). A factual finding to the contrary – that an agreement override is *not* necessary – should be subject to the same deference. Applying that standard, even if the Board disagrees with the ATDA and concludes that the Hampton Award encompasses "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions," the Award withstand review because the Arbitrator did not commit egregious error in making his findings.

3. Adherence to the Board's decision imposing protective conditions on this transaction

An arbitrator creating an implementing agreement under Article I, Section 4, is required to comply with both *New York Dock* and the decisions of this Board applying those Conditions.

In that regard, the arbitrator must be cognizant of the Board's observations when imposing the Conditions.

In this case, when it approved the CN-IC merger, the Board "augmented" the labor protective conditions. 4 STB at 144. Most importantly, the Board addressed both the issue of CBA changes and modification of benefits. The Board explained that while "[t]he basic framework for mitigating the labor impacts of rail consolidations is embodied in the *New York Dock* conditions...[w]e may tailor employee protective conditions to the special circumstances of a particular case." *Id.* at 162. The Board observed that "[t]his is done where unusual circumstances require more stringent protection than the level mandated in our usual conditions" and that the circumstances of the CN-IC merger were such that they warranted "grant[ing] certain requests to modify or clarify our basic conditions." *Id.*

The Board was particularly receptive to rail labor's concerns regarding possible changes that the carriers might propose in collective bargaining agreements. It

> admonish[ed] the parties to bargain in good faith to embody implementing agreements in CBAs rather than having such agreements arbitrally imposed. Good faith bargaining has always been an integral component of the *New York Dock* process. Applicants conceded at oral argument that the arbitrator, and the Board, if necessary, could properly take notice of any abuse of process in their deliberations.

Id. at 163. In the Board approval proceeding, ATDA had raised an issue as to the continued application of certain ATDA agreements under which some ATDA-represented employees received "lifetime protection." The Board found those issues "not yet ripe" and referred the parties to the implementing agreement process. In so doing, it explained:

> Only if that process fails, and applicants claim that changes need to be made in these CBAs, will it be necessary for an arbitrator to rule on these issues in the first instance. And those arbitrators will be constrained in this process not to change any protected "rights, privileges, and benefits," and only to make those changes that are necessary to carry out this transaction as significantly limited by the Board in *Carmen III.*

Id. at 164. The Board reiterated that "due to the end-to-end nature of the proposed transaction, applicants themselves have acknowledged that implementation of the CN control transaction will

require at the most only modest adjustments to existing CBAs." *Id.* at 164, n. 101.

The rulings in the Board's 1999 approval decision were consistent with holdings in earlier cases that overriding CBAs may happen in *NYD* situations "only when necessary – not merely convenient – to effect an approved transaction and realize a transportation benefit such as enhanced efficiency or greater safety." *Burlington Northern Santa Fe Railway Company and Brotherhood of Maintenance of Way Employes*, F.D. No. 32549 (Sickles, March 25, 1999) (Exhibit E), p. 21.

Nevertheless, *NYD* Article I, Section 4 provides "Each transaction which may result in a dismissal or displacement of employees, or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." There is no disagreement that the transaction put before Arbitrator Hampton would result in employees being displaced or dismissed and forces being rearranged, so he was required to find an appropriate basis for the selection of forces and assignment of employees to perform the GTW work being transferred to Homewood. That included consideration of working agreements, seniority and prior rights, among other things.

We show below that CN has failed to establish either prong sufficiently to warrant review here. Even if CN convinces the Board that it has satisfied the threshold *Lace Curtain* requirements, it has not carried its burden of demonstrating that the Award itself is somehow defective because the items which the Arbitrator included in the Agreement here were clearly within the jurisdiction of a *NYD* arbitrator to grant.

B. The Arbitrator's Award is Well Within His Jurisdiction.

1. Arbitrator Hampton properly determined that the Carrier did not meet the standard for overriding the ATDA agreements.

Arbitrator Hampton found that the Carrier here did not satisfy its heavy burden to justify overriding the ATDA agreements. He found that the evidence showed that the efficiencies

associated with moving the GTW train dispatching operation to Homewood could be accomplished without a CBA override. Only in the future, when a single system is in place would a single CBA be necessary.

The Carrier argues that this isn't what it wanted. It says that the Arbitrator either didn't understand that CN needs to have IC dispatchers controlling traffic on the former GTW property or he knew it but exceeded his authority by denying CN the right to accomplish that. However the Carrier characterizes the Arbitrator's decision, the fact remains that it failed to prove that overriding the ATDA agreement was necessary to implement the transfer of work, and that is why the Arbitrator rejected its proposal to eliminate the ATDA agreement. On factual issues like this, the Board should defer to the arbitrator.

CN argues that because it told the Board in its filings supporting its original Application that it intended at some point to conduct all train dispatching from Homewood, the Board implicitly approved elimination of the ATDA-GTW collective bargaining agreement. However, the Carrier's filings with the Board do not support this and the Board's decision itself reveals that to be a significant exaggeration.

In its Approval Decision (p. 41), the Board cautioned "[s]pecifically, [that] our approval of this transaction does not constitute a finding that any override of a CBA is necessary to carry out the transaction; rather, such matters should be left to negotiation and arbitration." The Board also "constrained" *NYD* Article I, Section 4 arbitrators "only to make those changes that are necessary to carry out this transaction as significantly limited by the Board in Carmen III." *Id.* at 42.

The Board described the then-existing train dispatching situation and the Applicant Carriers' intentions as follows:

> *Preservation Of Rates Of Pay, Etc.* Applicants have indicated: that there are currently three separate train dispatching centers on the combined CN/IC U.S. rail system (CN trains moving over the physically discrete GTW and DWP lines are dispatched from separate centers in Troy, MI, and Pokegama Yard near Superior, WI, respectively, and IC trains are dispatched from IC's Network Operations Center in Homewood, IL); that the three dispatching centers utilize

separate train control and information systems and somewhat different operating practices; that the CN/IC control transaction offers the opportunity to consolidate the dispatching functions and to unify operating practices for the GTW/DWP and IC lines in a manner that will improve efficiency, service, and safety; and that, in order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single CBA with a single seniority roster.

Applicants have further indicated: that, following implementation of the CN/IC control transaction, the dispatching function will be consolidated at Homewood; that the physical relocation, the training on various dispatching systems, and the unification of operating practices will be accomplished in distinct steps; that there will therefore be, for a short interval following the physical relocation, three dispatching operations at Homewood; that, during this interval, the GTW/DWP and IC dispatchers will continue to dispatch their own territories using the equipment and processes with which they are familiar (and, although they will be under the same roof, will dispatch as though they were separate entities); and that, during this interval, a combined operating practices rule book will be produced and the existing dispatching systems will be modified, and all dispatchers will be trained on CN/IC's consolidated U.S. operating rules. See CN/IC-7 at 176-78 and 204. See also the Revised Safety Integration Plan at 67-73.

ATDD[10] contends: that, during the "short interval" referenced by applicants (i.e., during the period that will begin with the physical relocation to Homewood and that will end with the actual consolidation of train dispatching operations), it will not be necessary to bring the three dispatching groups under a single CBA with a single seniority roster; that, until such time as all train dispatching systems themselves are unified, the carriers should be required not to disturb existing collective bargaining relationships; that, because there will be, during the "short interval," separate dispatching operations, there is no warrant for any disruption of CBAs or representation during that interval; and that any disruption of ATDD's existing representative status and agreements would undermine the stability of the labor/management relationship. ATDD further contends: that, even assuming arguendo that pre-transaction representation arrangements are not a "right, privilege or benefit" that must be preserved, no CBA provision may be modified if the modification is not necessary to implementation of the transaction; and that there is, in the present context, no necessity at all, given that ATDD-represented GTW dispatchers are scheduled to continue to work independently from the other train dispatchers at Homewood, just as they did in Troy.

Id. at 135.

What the Carrier's February 3, 2009 Notice to Employees announced was the move from Troy to Homewood prior to the "short interval" that the Applicants described to the STB. At no time since did CN indicate that it would be eliminating the period during which "following the

[10] At the time, ATDA was known as the American Train Dispatchers Department of the Brotherhood of Locomotive Engineers ("ATDD").

physical relocation, ...the GTW/DWP and IC dispatchers will continue to dispatch their own territories using the equipment and processes with which they are familiar (and, although they will be under the same roof, will dispatch as though they were separate entities)." That is the factual basis for the Arbitrator's determination that the Carrier did not prove that elimination of the ATDA CBA is presently necessary to effectuation of the move of the GTW dispatchers to Homewood. The evidence at the November 10 arbitration hearing bore that out. The Carrier did not show that it had any current plan to operate over the GTW, IC, and WC tracks as a single system, or that the GTW system was being integrated with the rest of the CN system. CN, as the advocate of an agreement override, bore the burden to show that eliminating the ATDA CBA is necessary to effectuate the move to Homewood; it failed to carry that burden.

Before the Arbitrator, the Carrier relied on four purportedly "obvious efficiencies" to support its position that the GTW employees should not carry their CBA with them to Homewood: "eliminating the need to rent space in Troy, the integration of equipment, combined managerial and IT support, and the operational flexibilities that arise naturally from combining work." CN Submission, p. 9. The first three of these items have nothing to do with the ATDA CBA. The arbitral record showed that the fourth was premature as there was insufficient evidence that assignment of work across GTW-IC operating lines is imminent.

Under established STB and *NYD* precedent, the Carrier was required to prove that eliminating the ATDA CBA is necessary to implementing the transfer of GTW dispatching work to Homewood. That precedent holds that a *NYD* arbitrator *may*, but is not required to, allow a carrier to override provisions of a collective bargaining agreement. A *NYD* arbitrator may impose an implementing agreement that does not override a CBA if he finds that to do so is not "necessary" but is "merely convenient – to effect an approved transaction and realize a transportation benefit." *Cf. Burlington Northern Santa Fe Railway Company and Brotherhood of Maintenance of Way Employes, supra.* The Carrier did not satisfactorily demonstrate why continuing under the existing agreement will substantially interfere with the purposes of the

transaction. CN made broad statements to the arbitrator regarding efficiencies, but it did not submit proof to back up the argument that eliminating the GTW CBA is necessary to accomplishing them. In these circumstances, he properly concluded that the GTW Agreement should continue to apply until there is a single system for purposes of train dispatching. At that time a single system agreement can be negotiated.

In the *BNSF/BMWE* dispute, the carrier moved groups of employees working under different agreements and attempted to use *NYD* to place them all under the same agreement. The arbitrator rejected that proposal, pointing out:

> an arbitrator may modify CBA provisions only when necessary to achieve a transportation benefit. The Carrier has failed to demonstrate that all headquartered employees in the consolidated zones must work under a single CBA. That proposal falls squarely under the category of "convenient, but not necessary." Therefore, the BMWE's proposal that all headquartered employees in Amarillo, Chicago, Fort Worth, Galesburg, Kansas City, and Oklahoma City would continue to work under their respective shall be adopted.

Id. at 32. This is very similar to what arbitrator Edward Suntrap faced when the Rio Grande Industries, which had acquired the Southern Pacific Transportation Company, moved the SP train dispatchers from California to a new facility on the Denver & Rio Grande Western Railroad property in Denver. *See Rio Grande Industries Inc., etc., vs. Brotherhood of Locomotive Engineers - ATDD Division* (Suntrup, 1994) (Exhibit F). That arbitrator, like Mr. Hampton here, rejected arguments that the ATDA agreement should be terminated and all of the employees should be placed under the agreement covering DRGW dispatchers.[11]

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[11] The precedent the Carrier relies on for a different result is factually inapposite. For example, the transaction in *BMWE v. Union Pacific R.R. Co.* (Meyers, 1997) (Petition p. 18) was to "implement a system operation." *See also Consolidated Rail Corporation and Monongahela Railway Company and UTU*, F.D. No. 31875 (LaRocco 1992) (Exhibit G) (total elimination of one of two former systems as the two systems became "homogenous [and] they will henceforth constitute one railroad."). Here, the evidence showed that the Carrier is not about to merge the GTW and IC systems.

The Carrier's argument that overriding CBAs is a given necessity whenever there is a consolidation is also in error. Consolidation does not necessarily require integration. The relocation of all dispatching operations from multiple locations to a single facility is a consolidation, whether or not those system lines are dropped and operations themselves are

(continued...)

Furthermore, the Carrier admitted that there would be no systemwide train dispatching. Instead, groups of dispatchers from several properties will continue to control rail traffic over their former territories. Operating under separate CBAs, as the Carrier always has as to these lines, certainly would not impede the efficiencies CN would obtain by putting the dispatchers under the same roof because separate system operations will continue. Unlike situations where repair work on identical equipment has been consolidated into a single shop, the GTW lines are "physically discrete"(see p. 17, *supra*), so dispatching on those lines is easily identifiable work.

The Carrier argues that the Award violates the "controlling carrier" principle because it doesn't apply the ICTDA agreement to the newly-created Homewood jobs. That principle, however, has been applied in cases where there will be such a significant commingling of work that prior working lines can no longer be distinguished. That is not happening here, at least beyond "Chicagoland." Those cases therefore are not convincing authority for accepting CN's proposal. *See* fn. 10.

Furthermore, because CN proposes to overlap territory in dispatching assignments covering only the Chicago area, there is no valid reason for abrogating the GTW-ATDA agreement for other territory or beyond the positions affected by that change.[12] CN relies on the Declaration of its Senior Chief - Chicago Division who says that once the GTW dispatchers are in the Homewood office, the Carrier "will have the flexibility to reorganize the geographic scope of existing 'desks,' or teams of dispatchers assigned to dispatch trains over a particular geographic area." Frasure Declaration ¶ 7. He does not say that CN intends for that to occur anywhere but Chicago. Because all of the territories are not going to be integrated, and there is

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[11](...continued)
integrated.

[12] This is what happened in *Burlington Northern Santa Fe Railway Company and Brotherhood of Maintenance of Way Employes, supra*, p. 32 ("The Carrier has failed to demonstrate that all headquartered employees in the consolidated zones must work under a single CBA.... BMWE's proposal that all headquartered employees in Amarillo, Chicago, Fort Worth, Galesburg, Kansas City, and Oklahoma City would continue to work under their respective CBAs shall be adopted.").

no evidence they are, there should be little difficulty continuing to treat the former GTW territory as preserved for the ATDA dispatchers working under the ATDA agreement.[13]

2. Arbitrator Hampton properly provided for GTW dispatchers to retain prior rights.

Both parties' proposals put prior rights on the table. CN seems not to complain about those provisions of the imposed implementing agreement that grants prior rights to the Troy dispatchers to work over the GTW territory, including affording those Troy dispatchers who do not initially move to Homewood to later move as vacancies occur on the same terms as the initial group of transferees.[14]

ATDA proposed, and the Arbitrator agreed, that the dispatchers transferring to Homewood retain prior rights to perform all work on GTW trackage unless they bid to a position not covered by the ATDA-GTW agreements or they resign, retire, become dismissed from service, or are promoted. This provision preserves for all of the transferred dispatchers the ability to continue working should there be future layoffs in Homewood caused by reductions in work unrelated to the GTW transaction. This is only fair since they are the dispatchers who transferred to Homewood specifically to perform the work.

The Award also provides that the dispatchers remaining at Troy will retain the right to bid on positions at Homewood that dispatch trains over GTW tracks as those positions become vacant or if new positions doing that work are created. The Carrier has plans to transfer only 10

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[13] The Carrier told the Arbitrator that even when the time comes that it cross-trains the Homewood dispatchers, it only intends to use employees experienced on one carrier's system to dispatch over another's "in the event of storms, derailments, labor disputes affecting other carriers, or other unanticipated circumstances." Frasure Decl. ¶ 7.

[14] "Employees awarded positions created [at Homewood] will retain prior rights to those positions based upon their relative seniority standing as transferred. The rights will only be terminated in the event (1) The transferring GTW Employee successfully bids to another assignment not covered by the ATDA-GTW agreements or, (2) The employee resigns, retires, becomes disabled, is dismissed from service, or is promoted. Once a position established [at Homewood] is no longer subject to prior rights under this agreement, it will, if necessary, be filled in accordance with the ATDA Agreement subject to paragraph 4, above [i.e., offered to former dispatchers holding clerical jobs at Troy]."

of the 16 dispatching positions from Troy to Homewood. The dispatchers who do not transfer now will be working in the clerical craft at Troy. Should vacancies later occur in the new positions being created at Homewood and a GTW dispatcher exercises the right to take one of those positions, the Award provides for him to transfer under the same terms and conditions as applied to his fellow employees when they moved to Homewood in the initial move. This provision simply allows all sixteen of the GTW dispatchers to follow their work on the same terms. Not only is this provision fair and equitable as it allows these dispatchers to continue working in the craft as opportunities arise, it also provides the carrier with a source of experience it would not otherwise have available.[15]

This result is not unusual. In *Seaboard System Railroad and American Train Dispatchers Association* (Marx, 1985) (Exhibit H), Seaboard proposed to shut down its Birmingham train dispatching office and transfer the work to other offices without increasing the workforce at those offices. None of the Birmingham dispatchers were offered positions at the other offices. ATDA proposed that the Birmingham dispatchers' seniority rights be preserved "in the event that the rearrangement of work does lead to new Train Dispatcher work opportunities in the locations where the work is assigned." *Seaboard* p. 13. The *NYD* arbitrator held that this was "entirely proper," citing with approval the observation of the arbitrator in *Baltimore & Ohio, etc. and Brotherhood of Maintenance of Way Employees, etc.* (Seidenberg, 1983) to the same effect.[16] Similarly, in the CSXT radio repair consolidation case involving the movement of IBEW members' work to a TCU-represented location (See fn. 10, *supra*), the arbitrator rejected CSXT's position that the non-transferring employees lose all rights to the work being moved. Instead, he

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[15] In its Petition (p. 33), the Carrier bemoans the cost of training new dispatchers. This would avoid that need.

[16] "While it is unquestioned that the B&O has the sole discretion to determine the size of the work force it wants to use from the NS&S forces...this does not mean that the B&O can, or should be permitted, unilaterally to extinguish the vested seniority...rights of inactive NS&S employees. The B&O intends to operate on NS&S territory and it is inappropriate for the B&O to take action that would cause the N&SS to lose permanently their recall rights to work on NS&S territory, if the exigencies of operations should warrant such a happy state."

adopted IBEW's proposal providing for the IBEW-represented employees with seniority at the locations from which work was being transferred to be able to bid on repair work vacancies that occurred post-transfer. He explained that "[n]ot giving these employees prior rights to such positions would make it possible for the Carrier to restore the remaining abolished positions and make them available only to TCU-represented employees. This would not be equitable."

While CN would immediately dovetail the ten transferring dispatchers with the IC dispatchers and eliminate the GTW roster along with continuing rights of the six remaining at Troy, it has never denied that there may be future additional opportunities to perform dispatching over GTW territory.

CN offered to grant prior rights only to employees who transfer and to the newly-created positions they would fill. Under the Carrier's proposal, the GTW work would have been open to non-GTW dispatchers working under the ICTDA agreement. The Arbitrator rejected that proposal. It is not necessary to eliminate the Troy dispatchers' exclusive rights to dispatch trains over the GTW tracks to effectuate the transaction. Even if the Carrier prevails in its argument that the ATDA agreement should have been overridden, which we emphasize is not justified on this record, this is not a reason to deny prior rights to the dispatching on the transferred territories. Insofar as the Carrier may argue that in that circumstance, jobs to which such rights would attach will be too difficult to identify, we submit that there is an easy solution. When new positions overseeing combined territories are established, one can use a "preponderance" test to determine whether a prior right to the job accrues: if the predominant part of the job's responsibilities covers GTW territory, then it should be a prior rights position; if not, it could be open to all qualified dispatchers in the office.

3. The benefits included in the imposed agreement are "within the context and spirit" of *NYD* and consistent with industry practice; their inclusion should be affirmed.

Arbitrator Hampton did not "expand the basic benefit structure" of *NYD* as CN contends (p. 28). Rather he carefully considered the proposals of both sides and imposed terms that are wholly consistent with the context and spirit of the Conditions. The Railroad says it withdrew its

more generous proposals because it thought the Union was not acting in good faith; the Union responded to what it considered the Railroad's intransigence by digging in its heels and insisting on its proposed terms. The Arbitrator apparently found neither side's behavior justified abandoning their movement toward a negotiated resolution of their differences over benefits so he used their proposals to "craft" appropriate implementing agreement provisions addressing them. By doing so, he did not embark on a frolic of his own; he fashioned an award in light of the parties' own handling of their disagreement.

a. The six separation allowances.

There is no question that all of the Troy dispatchers are qualified to perform the work at Homewood. The six dispatchers who do not have sufficient seniority to successfully bid one of the positions being created there will have the choice of being furloughed and becoming eligible for a dismissal allowance under NYD Section 6 (or resigning in exchange for a lump sum separation allowance as Section 7 allows instead) or accepting a clerk's position. The Arbitrator accepted ATDA's position that allowing six dispatchers to choose, *before* the move, whether to take a lump sum separation allowance based on seniority, thereby leaving the positions they might otherwise have bid at Homewood available for junior dispatchers, was fair and would not interfere with the transaction. This provision simply changes the identities of the qualified dispatchers who transfer; that should not be of concern to the Carrier as all of the potential transferees are qualified. Consequently, there is no reason not to allow this part of the award to stand.

The skills associated with train dispatching are very specialized and are not easily transferrable to non-railroad positions. Such separation allowances would bridge senior employees to retirement or enable those forced to find employment outside the industry not to suffer loss of income if they have to take jobs, as they likely would, that pay them less.

The Union submitted evidence that the offering of such separation allowances to train dispatchers has become a common element of railroad industry implementing agreements. See

Exhibits I, p. 2, and J. The Arbitrator's decision to include provision for six such allowances was consistent with industry practice and the number of dispatching jobs CN is eliminating. It should be sustained.

CN complains that the Arbitrator exceeded his jurisdiction in this regard because *NYD* does not provide for separation allowances for employees who refuse to transfer with available work. What it glosses over is that in these circumstances, the provision does not impact the carrier financially. CN's plan is to abolish sixteen dispatcher positions in Troy and create ten in Homewood. That means that only ten of the sixteen dispatchers would have been able to move to Homewood in any event, so the Arbitrator's determination that there be six separation allowances made available does not impact the Carrier's desired post-transaction force level at Homewood. Whether it is the six most junior Troy dispatchers, the six most senior Troy dispatchers, or some mix of the sixteen who do not go to Troy should be irrelevant to the Carrier. Furthermore, anyone who is left behind without a dispatching job would be entitled to a dismissal allowance under *NYD*, a component of which is the ability to elect a lump sum separation allowance. The fact that the Arbitrator directed that separation allowances be offered on a seniority basis does no harm whatsoever to the transaction and hence does not represent an action outside the Arbitrator's jurisdiction.

b. Optional moving and real estate provisions.

Section 9 of *New York Dock* describes how employees who are required to move in order to continue employment will be reimbursed for expenses incurred in connection with moving. Section 12 of *New York Dock* describes how employees who are forced to sell their homes in connection with a move are to be reimbursed for possible losses suffered in connection with those home sales. It also provides for employees who rent their residences to be protected from costs associated with breaking leases.

ATDA submitted evidence of a common practice in the industry for employees to be given the option of accepting lump sum payments in lieu of going through the procedures

outlined in *NYD* Sections 9 and 12. CN had initially included that in its original proposal, but rescinded it when ATDA presented a counterproposal. The Arbitrator's imposed Agreement contains a lump sum option identical to what the Carrier had proposed – relocating employees who own homes can receive five $2,000 payments over a period of 15 months, provided they are in active service at Homewood at the time each payment is due, plus $10,000 if they sell their home in Troy at fair market value, provided the relocation and sale occur within two years of the transfer.[17] As for employees who rent housing in the Homewood area, the imposed agreement reimburses up to $1,300 per month for actual out-of-pocket rental costs for up to 24 months, also what CN had initially proposed.[18]

c. The house-hunting allowance.

In his Award, the Arbitrator provided that employees who successfully bid positions at Homewood "be allowed four (4) days with pay for the purpose of locating a residence in the Homewood [which] may be split up for up to two (2) house-hunting trips and shall be scheduled in conjunction with the Employees rest days" with $500 lump sum payment "to defray expenses associated with [such] trip to the Homewood area."[19] This provision too is in accord with industry practice and was part of CN's initial proposal.

d. Exercise of clerical craft seniority

The Award provides that employees who do not go to Homewood but instead exercise seniority they may have in the clerical craft remain eligible for displacement allowances, *provided* all of the available dispatching positions at Homewood are filled. Had the Arbitrator held otherwise, CN would have been able to discriminate between the former dispatchers left at

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[17] The arbitrator rejected the Union's proposal is that all employees who relocate receive a $20,000 lump sum payment as an incentive to relocate and that the employee be given the option to have the carrier purchase his home at the greater of fair market value or the original purchase price.

[18] ATDA had proposed $1,500 per month for 48 months.

[19] ATDA had proposed 5 days and up to $2,500 in expense reimbursement.

Troy (i.e. between those who get clerk's jobs by exercising seniority and those who fill clerk's jobs the carrier creates for them), even though all of the positions CN wanted filled at Homewood were filled. If those positions are filled, no dispatcher left at Troy would have a dispatching job to work. In that circumstance, for purposes of protective benefits, it should not matter how the dispatcher obtains other work at Troy. And the cost to the Carrier is identical.

Some of the 16 GTW dispatchers also maintain seniority in the clerks' craft or class under the collective bargaining agreement between GTW and the Transportation-Communications International Union. If they are forced to exercise this seniority in order to continue working as a result of this transaction, they should be entitled to a displacement allowance to account for the reduction in compensation that likely will occur as a result.

C. The Carrier's other arguments are inconsequential.

1. Several times CN states that if all it wanted to do was to move the entire GTW dispatching operation to Homewood, which it says is all it can accomplish under the Award, it would not have had to go through this process. Relocating dispatching from Troy on the GTW property to Homewood on the IC property itself, CN says, is not a *NYD*-covered transaction. That is wrong. *NYD* applies to any transfer of work across former carrier lines where, as here, the transfer could not have been accomplished in the absence of STB authorization of the acquisition of one line by another carrier. Furthermore, every employee would be entitled to moving and real estate benefits, at the very least. The fact that all, rather than some, of the employees will have to move to follow the work across formerly separate carrier lines is irrelevant.

2. ATDA agrees with the Carrier that this Board and *NYD* arbitrators are not vested with the authority to resolve representation disputes. Such disputes undeniably fall within the jurisdiction of the National Mediation Board. But Arbitrator Hampton did not wrongly stray into the representation area. The Carrier's complaint that he did (p. 25-27) is an overreaction. His Award provides that the ATDA agreement will continue to apply to the dispatchers currently

represented by the ATDA "until such time as a single agreement is reached covering all ATDA represented dispatchers." Agreement p. 4. This ruling is a contract application, not a union representation, decision. What Arbitrator Hampton did is to preserve ATDA agreements until such time as *all* dispatchers at Homewood are covered by one agreement encompassing *all* of the dispatching work being done there. He did not determine who the representative would be at that time.

3. Finally, the Carrier complains (p. 24) that the Award improperly requires that it undertake the transaction by March 1, 2010, as it states "This Agreement shall be effective no later than March 1, 2010." ATDA understands the Award to allow for the transaction to occur no earlier than March 1, 2010, and that it should not be interpreted to require the Carrier to consummate the transaction by that date. A *NYD* award does not require a carrier to proceed, it only establishes the terms that will govern if and when a carrier does proceed. Insofar as the provision CN cites might be interpreted otherwise, we submit that the Board can clarify that the Carrier does not have to proceed if it chooses not to do so.

CONCLUSION

For these reasons, the Board should dismiss the Carrier's Petition and affirm the arbitration Award because it is consistent with the principles and requirements of *New York Dock* and the Board's decision approving the original transaction.[20]

Respectfully submitted,

/s/ Michael S. Wolly
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Attorney for ATDA

[20] If the Board determines that the Award should be set aside in some regard, which we don't believe it should, it should remand the matter to Arbitrator Hampton for further proceedings and a revised implementing agreement that conforms with the Board's direction.

CERTIFICATE OF SERVICE

This is to certify that a copy of this Brief has been served upon counsel for the Carrier and counsel for the ICTDA by electronic mail and by first class mail, postage prepaid, this 19th day of April 2010.

/s/ Michael S. Wolly
Michael S. Wolly

ATDA EXHIBITS

LIST OF ATDA EXHIBITS

LETTER	DESCRIPTION
A	Declaration of David Volz
B	Carrier's Final Offer
C	ATDA's Final Offer
D	*Norfolk & Western Ry. Co. and Brotherhood of R.R. Signalmen* (LaRocco 1989)
E	*Burlington Northern Santa Fe Railway Company and Brotherhood of Maintenance of Way Employes*, F.D. No. 32549 (Sickles, March 25, 1999)
F	*Rio Grande Industries Inc., etc., vs. Brotherhood of Locomotive Engineers - ATDD Division* (Suntrup, 1994)
G	*Consolidated Rail Corporation and Monongahela Railway Company and UTU*, F.D. No. 31875 (LaRocco 1992)
H	*Seaboard System Railroad and American Train Dispatchers Association* (Marx, 1985)
I	ATDA/CN/Duluth, Missabe and Iron Range Railway Company Implementing Agreement
J	ATDA/CSXT Separation Allowance Agreement

ATDA EXHIBIT A

DECLARATION OF DAVID VOLZ

I, David Volz, declare the following is true and correct to the best of my personal knowledge:

1. I am a Vice President of the American Train Dispatchers Association. I am the officer of the ATDA who was directly responsible for coordinating the bargaining with CN/IC for an implementing agreement to address the transaction identified in the Carrier's February 3, 2009 *New York Dock* notice to the union.

2. In its Pre-Hearing Submission to the arbitrator, the Carrier presented a description of the events following service of its *New York Dock* notice that is in many ways inaccurate and incomplete. For example, the Carrier has submitted only some of the email correspondence between the parties. The missing emails, dated March 23, April 13, April 29, May 4, and August 31, 2009 are attached hereto as Attachment A.

3. The Carrier also ignores many of the phone conversations that occurred between Senior Manager-Labor Relations Cathy Cortez, the Carrier's representative responsible for the implementing agreement negotiations, and me. Anyone reviewing the Carrier's Submission would have no idea that I spoke with or left messages for Ms. Cortez on numerous occasions by phone. I talked with her about the implementing agreement on March 27, April 21, June 23, twice on June 26, July 13, July 23, and August 4, 2009. I left a message for her on June 29, when she was on vacation. There were three other phone calls she never returned. I returned all of her calls promptly.

4. When discussing the ATDA's unavailability in February and March on page 4 of its Submission, the Carrier does not acknowledge the fact that it did not have a proposal ready to present to ATDA until April 15, 2009. The Carrier says it "circulated a draft implementing agreement...shortly in advance of the meeting" on April 15, 2009. That is quite an overstatement. Ms. Cortez did not "circulate" the proposed implementing agreement until ATDA President Leo McCann and General Chairman Joe Mason showed up for the April 15

bargaining meeting. This is evidenced by Cortez's notation at the top of the Carrier's proposal (CN/IC Exhibit 8) "Carrier Proposal 4/15/09." Then, the parties had to recess the meeting until after lunch to give ATDA's representatives an opportunity to look it over. It hardly would have accomplished anything to meet with Cortez in February or March because the Carrier had yet to prepare its proposal.

5. One of the emails the Carrier failed to include in its Submission is dated March 23, 2009 from me to Ms. Cortez. I asked her whether she wanted to confirm the April 15 and 16 meeting dates or whether she needed more time to complete the proposal.

6. At page 4 of its Submission, the Carrier says "During the April 15, 2009 meeting, the Carrier and the ATDA tentatively planned to conduct another bargaining session in early June." This interval of time was agreed to by the Carrier; its current criticism about the length of the interval certainly is unwarranted. When I agreed to a tentative date during the week of June 1, I had overlooked the fact that President McCann was unavailable due to a Public Law Board commitment that week; once I realized this oversight, I so advised the Carrier on April 22, 2009.

7. At the conclusion of the April 15 meeting, General Chairman Mason approached Hunt Carey, the Carrier manager who oversees train dispatching, about the company reconsidering its position concerning putting the GTW dispatchers under the IC Agreement. Carey said he'd consider that, but he never got back to Mason on the issue.

8. The parties next met via teleconference on June 16, 2009. During that conference call, ATDA asked Ms. Cortez where the company stood on the IC agreement coverage issue, reminding her about Mason's conversation with Carey. She said she wasn't aware of this conversation and would talk to Carey to see if they were interested in revising their proposal and would let us know. We told her that if the carrier was not going to revise its proposal, the ATDA would prepare a counter proposal, which we did and presented to the company on July 25, 2009, via email.

8. The parties next met via teleconference on June 16, 2009. During that conference call, ATDA asked Ms. Cortez where the company stood on the IC agreement coverage issue, reminding her about Mason's conversation with Carey. She said she wasn't aware of this conversation and would talk to Carey to see if they were interested in revising their proposal and would let us know. We told her that if the carrier was not going to revise its proposal, the ATDA would prepare a counter proposal, which we did and presented to the company on July 25, 2009, via email.

9. The Carrier accuses the ATDA of causing all of the delay, but Cortez's own email establishes that that is not correct. In her August 3, 2009, email to me (CN/IC Exhibit 20). Cortez states "I'm well aware that scheduling can be difficult, what with other bargaining, vacations, arbitration, family issues and travel restrictions. We have experienced all of those issues from our side of the table as well." Not surprisingly, the Carrier doesn't acknowledge this admission in its submission. There was no "pattern of delay" on the part of the Union. The process took as long as it did because both sides had conflicts that affected scheduling of bargaining sessions.

10. In its Submission the Carrier frequently repeats the mantra that it, and only it, wanted to reach a voluntary agreement instead of going to arbitration. However, when I presented ATDA's final proposal to Ms. Cortez on August 31 via email, I told her that we too were willing to have further discussions in the hope of reaching a voluntary agreement. She never responded to this invitation.

11. Ultimately, the Carrier presented only one serious proposal. When ATDA countered with a proposal that reflected the interests of the affected employees, CN/IC responded

not by bargaining but by rejection without comment, invoking arbitration, withdrawing its previous offer, and totally regressing on every issue to which ATDA had countered. This hardly constitutes a good faith attempt to arrive at a voluntary agreement. For the Carrier now to complain that ATDA did not budge in response to the Carrier's behavior is disingenuous, to say the least.

David Volz

Dated: December 3, 2009

ATTACHMENT A

Subj. **GTW NYD Negotiations**
Date: 3/23/2009 9:37:12 A.M. Central Daylight Time
From: Atdddwv
To: Cathy.Cortez@cn.ca
CC: ATDAMCCANN, atdaclb@yahoo.com, josephwmason1@juno.com

Cathy:

It is my understanding that the dates of April 15 and 16 are tentatively scheduled for the NYD negotiations involving the GTW dispatchers. Do you wish to confirm these dates? Or, do you need additional time to complete the proposal you have been working on?

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

Subj: **Re: 4/15 Meeting**
Date: 4/13/2009 6:23:58 P.M. Central Daylight Time
From: Cathy Cortez@cn ca
To: atdddwv@aol.com

Works fine for us.

From: Atdddwv
Sent: 13/04/2009 06:04 PM EDT
To: Cathy Cortez
Cc: ATDAMCCANN@aol.com; josephwmason1@juno.com
Subject: 4/15 Meeting

Cathy:

We'd like to start the meeting at 10am on the 15th. Leo is flying in that morning and arrives Midway at 830am. This will give him time to make it to your offices. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

Subj: **Re: GTW NYD Negotiations**
Date: 5/4/2009 4:27:49 P.M. Central Daylight Time
From: Cathy.Cortez@cn.ca
To: Atdddwv@aol.com
CC: ATDAMCCANN@aol.com, Hunt.Cary@cn.ca, josephwmason1@juno.com

David -

Please let me know. I will try to contact you later in the week. We're not looking at an all-day call, just something to gauge where we are in the process.

Thanks.

Cathy Cortez
Senior Manager – Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddwv@aol.com

04/29/2009 10:21 PM

To Cathy Cortez@cn.ca

cc ATDAMCCANN@aol.com, josephwmason1@juno.com, Hunt.Cary@cn.ca

Subject Re: GTW NYD Negotiations

Cathy:

I've been tied up in negotiations this week. Our schedules are packed and I'm still searching for a date when we're all available.

In the meantime, what's the status of the agreement regarding the bonuses for the WC dispatchers?

David

In a message dated 4/22/2009 12:29:15 P.M. Central Daylight Time, Cathy.Cortez@cn.ca writes:

David -

Seeing as we're unable to schedule something face-to-face, we'd like to set up a conference call to move forward. What is your availability?

Thanks

Cathy Cortez
Senior Manager – Labor Relations
Office: 708.332.3570

Subj. **Re: Fw: Implementing Agreement**
Date: 8/31/2009 4.24:39 P.M. Central Daylight Time
From: Atdddwv
To: Cathy.Cortez@cn.ca, ATDAMCCANN, Joseph.Mason@cn.ca, Mike.Christofore@cn.ca, John.Czarny@cn.ca
CC: Timothy.Rice@cn.ca, ROGER.MACDOUGALL@cn.ca, Hunt.Cary@cn.ca
BCC: mwolly@zwerdling.com

Cathy:

Please find attached our counter proposal to your final proposal. We, too, are willing to discuss this further in the hopes of reaching a voluntary agreement. Please advise.

David

In a message dated 8/27/2009 5:40:42 P.M. Central Daylight Time, Cathy.Cortez@cn.ca writes:

> Further to my email of last night, here is an updated version. The previous one contained some typos.
>
> **From:** "aol" [jcortez130@aol.com]
> **Sent:** 27/08/2009 02:43 PM EST
> **To:** Cathy Cortez
> **Subject:** Implementing Agreement

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

ATDA EXHIBIT B

CARRIER final

Agreement between

GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY

And their employees represented by

AMERICAN TRAIN DISPATCHERS ASSOCIATION
ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW and IC served notice under Article I, Section 4 of the Protective Conditions of their intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and IC and the American Train Dispatchers Association ("ATDA") and the Illinois Central Train Dispatchers Association ("ICTDA") on behalf of employees represented by each respective organization to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, and to provide the necessary protection of employees,

IT IS AGREED:

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment B, covered under the agreement between the GTW and the ATDA will be abolished.

2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for ten (10) IC dispatcher positions at Homewood.

3. GTW dispatchers must submit their application for the above options or state their intent to exercise their seniority to another position under another Agreement to which they may hold seniority, in writing, to the individual designated by the carrier, with a copy to the employee's Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify options, will result in the employee being considered as furloughed without protection.

4. Assignments and awarding of positions shall be made in seniority order. In the event all positions provided in paragraph 2 are selected by dispatchers, clerical positions under the GTW/TCIU agreement will be made available to the remaining employees on the GTW/ATDA seniority rosters.

5. Employees transferring from Troy to Homewood under provisions of this Agreement shall become IC employees and be subject to the agreement in effect between the ICTDA and IC covering wages, rules and working conditions, subject to the modifications contained herein. On the effective

date of this Agreement, the employees transferred under Paragraph 4 shall be credited with prior GTW service on the IC for benefits and vacation purposes.

6. Employees awarded positions transferred under the provisions of Paragraph 4 and existing IC employees will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other dispatcher assignment available under the terms of the CBA or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ICTDA Agreement.

7. Employees awarded positions under Paragraph 4 will forfeit all GTW seniority and their seniority will be dovetailed with the seniority dates held by employees on the IC. In the event two or more employees from the different seniority rosters have identical seniority dates, the employees shall be ranked first by service dates, then, if service dates are the same, by date of birth, the oldest employee to be designated the senior ranking. This shall not affect the respective ranking of employees with identical seniority dates on their former seniority roster.

8. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. It is understood that if active and regularly assigned dispatchers at Troy decline to

apply for any of the ten (10) dispatcher positions at Homewood or if any of the ten (10) positions are left unfilled, then such employees will not be considered deprived of employment and shall not be entitled to the protective benefits contained in the New York Dock conditions as a result of this transaction.

9. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.

10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit

(regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

11. Each "dismissed employee" shall provide the carrier's designated individual the following information for the preceding month in which such employee is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the carrier.

(a) The day(s) claimed by such employee under any unemployment insurance act.

(b) The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer(s) and the gross earnings made by the dismissed employee in such other employment.

(c) The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and whether the employee received sickness benefits.

12. If the "dismissed employee" referred to herein has nothing to report account of not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for work the entire

month, such employee shall submit, on a form provided by the carrier, within the time period provided for in paragraph 11, the form annotated "Nothing to Report."

13. The failure of any employee to provide the information as required in paragraphs 11 and 12 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the carrier of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in paragraph 11, except in circumstances beyond the individual's control.

14. The carrier will make payment of the protective benefits within sixty (60) days of receipt and verification of the information required in paragraphs 11and 12.

15. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.

16. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.

17. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement

and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.

18. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization, but not later than September 21, 2009.

Signed this th day of , 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN RAILROAD COMPANY; and ILLINOIS CENTRAL

By: _____

Approved: _____

By: _____

By: _____

For: AMERICAN TRAIN DISPATCHERS ASSOCIATION

By: _____

Approved: _____

For: ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION

By: _____

ATTACHMENT A

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. Definitions. – (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collecting bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and

some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision – (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances – (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. – (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earning of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place or residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representative; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses where incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes. – (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event

the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. – (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence;

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be grated priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or re-training physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or re-training is requested by such employee, the railroad shall provide for such training or re-training at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ATTACHMENT B

	Last Name	Initials	Seniority
1.	Gebard	D.V.	4/19/1977
2.	Facknitz	E.A.	5/22/1977
3.	Campbell	L.P.	12/19/1981
4.	McAfee	M.L.	02/07/1987
5.	Mason	J.W.	11/30/1987
6.	Maidment	S.D.	1/14/1990
7.	Martenis	L.R.	06/02/1991
8.	Spring	M.S.	11/13/1991
9.	Plumley	T.R.	3/07/1993
10.	Maier	A.P.	10/19/1994
11.	Evans	T.D.	12/03/1994
12.	White	L.J.	6/05/1997
13.	Wery	N.D.	09/06/1997
14.	McDonough	K.E.	02/28/1998
15.	Cowgar	K.M.	03/05/1998
16.	Schott	J.F.	09/20/2000

ATDA EXHIBIT C

Agreement between

GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY

And their employees represented by

AMERICAN TRAIN DISPATCHERS ASSOCIATION

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW served notice under Article I, Section 4 of the Protective Conditions of its intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and the American Train Dispatchers Association ("ATDA") on behalf of employees represented by the ATDA to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, provides the necessary protection of employees,

IT IS AGREED:

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment C, subject to the agreement between the GTW and the ATDA will be abolished and the work they perform will be transferred to Homewood.

2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for at least ten (10) GTW dispatcher positions at Homewood to perform the work being transferred. Should additional positions be needed to perform such work, they shall be offered to those Troy dispatchers who are not part of the initial transfer of employees, as provided below.

3. GTW dispatchers must each (a) submit their application for a position at Homewood, (b) accept a separation allowance as provided for in paragraph 12, or (c) state his/her intent to exercise seniority to another position under another collective bargaining agreement under which he/she holds seniority (i.e. the GTW/TCIU Agreement), in writing, to the individual designated by the carrier, with copy to Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify options, will result in the employee being considered as having elected to exercise seniority under existing GTW/TCIU Agreements or otherwise accept a clerical position as provided in paragraph 4 below.

4. Assignments and awarding of positions shall be made in seniority order. In the event all positions provided in paragraph 2 are selected by dispatchers and not all separation allowances are claimed in accordance with paragraph 12, clerical positions, under the GTW/TCIU agreement will be made available to the remaining employees on the GTW/ATDA seniority roster. (See Attachment C). Employees who accept such clerical positions shall be considered displaced employees who retain rights to bid positions performing the dispatching work transferred to Homewood as such positions become available, and to transfer to such positions on the same terms and conditions applicable to those Troy train dispatchers who initially transfer to Homewood. They shall receive advance notice of such vacancies and be afforded a minimum of ten (10) days in which to bid. Failure to submit a bid will result in the surrender of all rights under this Agreement.

5. Employees transferring from Troy to Homewood under provisions of this Agreement shall remain subject to ATDA representation and all agreements, including all National Agreements, in effect between the ATDA and GTW covering wages, rules and working conditions, subject to the modifications contained herein, until such time as a single Agreement is reached covering all ATDA-represented train dispatchers working at Homewood.

6. Employees awarded positions created pursuant to paragraph 2 will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other assignment not

covered by the ATDA-GTW agreements or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ATDA Agreement subject to paragraph 4 above.

7. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement.

8. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.

9. GTW train dispatchers shown in Attachment C who exercise their seniority to obtain a TCIU/GTW position shall be considered eligible for a displacement allowance in accordance with Article I, Section 5 of New York Dock. The Carrier shall provide the respective employee with the calculations used to

determine his/her displacement allowance within thirty (30) days of assuming the clerical position. The Carrier shall pay such displacement allowance in the first pay period of the month following the month in which a displacement allowance is due.

10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

11. In the event any of the employees shown in Attachment C cannot hold a position under another GTW collective bargaining agreement (i.e. TCIU/GTW), cannot acquire a separation allowance as provided in paragraph 12, or cannot acquire a train dispatcher position in Homewood, such employees shall be eligible for a dismissal allowance in accordance with Article I, Section 6 of New York Dock. The Carrier shall provide the respective employee with the calculations used to determine his/her dismissal allowance within thirty (30) days of becoming a dismissed employee. The Carrier shall pay such dismissal allowance in the first pay period of each month.

12. There shall be at least eight (8) separation allowances offered by the Carrier, which shall be determined in accordance with Article I, Section 7 of New York Dock. Employees shall apply for a separation allowance in accordance with paragraph 3, which shall be awarded in seniority order. An employee awarded a separation allowance shall have the option to take it in a lump sum, payable within fifteen (15) days of the positions being abolished in Troy, or having it spread equally over a certain number of months to reach age sixty (60). Should an employee choose to have the separation spread over a certain number of months to reach age sixty (60), the first payment shall be made in the first pay period following the abolishment of positions and he/she shall continue to receive health benefits in accordance with the same provisions as active employees for each month in which the separation allowance is received. Notwithstanding the provisions of this Section, an employee who stands for a

separation allowance may chose to accept a VSA under the provisions of the Collective Bargaining Agreement.

13. Employees that transferred from Troy to Homewood under provisions of this agreement may at their option and in lieu of any and all benefits provided by Sections 9 and 12 of the New York Dock conditions (Attachment "A"), be afforded special options as provided in Attachment "B." Such election shall be made at the time of transfer.

14. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.

15. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.

16. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.

17. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization.

Signed this ____ day of , 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN RAILROAD COMPANY; ILLINOIS CENTRAL	For: AMERICAN TRAIN DISPATCHERS ASSOCIATION
By: _____	By: _____
By: _____	Approved: _____

ATTACHMENT A

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. Definitions. – (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collecting bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and

some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision – (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances – (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. – (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earning of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place or residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representative; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses where incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes. – (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event

the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. – (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence;

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be grated priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or re-training physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or re-training is requested by such employee, the railroad shall provide for such training or re-training at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ATTACHMENT B

In lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions, employees who accept positions at Homewood will receive a $20,000 lump sum payment (paid no later than thirty (30) days prior to the move) and may elect, at the time of their transfer, to accept one of the relocation packages as provided below. All transferring employees must select either relocation option (1) or (2), payments subject to taxation:

OPTION (1) GTW Employees who relocate their primary residence to the Homewood area will receive:

After fifteen (15) working days	$2,000
After sixty (60) working days	$2,000
After six (6) months	$2,000
After one (1) year	$2,000
After fifteen (15) months	$2,000

To qualify for the above payments, an employee must be in active service at Homewood at the time such payment is due.

GTW employees who relocate their primary residence and select the benefits of this Attachment at the time of their transfer will be entitled to an additional $10,000 upon proof of sale, at fair market value, of their primary residence in the Troy area, and proof of relocation to a new primary residence within a reasonable distance of Homewood. To qualify for the benefits of this paragraph, relocation of primary residence, including both sale and relocation, must occur within two (2) years of the date of transfer. In lieu of the

additional $10,000 payment, the employee can opt to have the carrier purchase his/her home at the fair market value or the original purchase price, whichever is greater.

OPTION (2) GTW Employees who rent in the Homewood area:

GTW employees who elect to rent or lease in the Homewood area, will be reimbursed for actual out-of-pocket costs of a rental accommodation, up to One Thousand Five Hundred Dollars ($1,500) per month ("rent reimbursement"). This rent reimbursement is to be used solely for the accommodations that are necessary in order for the employee to hold a Dispatcher position to Homewood, Illinois and is not intended to, and cannot, be used for any other purpose, including but not limited to enrolling children in school, paying expenses for your present residence (or any other residence), or paying for any additional costs that might incur as a result of relocating.

1. Rent reimbursement includes **only** the following items: monthly rent; the cost of a basic cable plan; monthly gas (heat) bill; monthly electric bill; and parking at your residence.
2. Rent reimbursement will be provided for only those expenses actually incurred and only up to the amount provided for in paragraph 1. The employee must provide proof that you incurred the expense in a format acceptable to the Company prior to being reimbursed for any expense. Examples of acceptable forms of proof include a signed lease agreement, monthly utility bills issued by the service provider for gas, light, basic

cable, and parking. The Company reserves the right to request the employee provide a receipt for proof that the expense has been paid.

3. The Company has agreed to pay the taxes for the rent reimbursement to the extent that it is considered ordinary income and subject to taxation. All rent reimbursement and taxes paid by the Company will be reported on the employee's statement of earnings.
4. Rent reimbursement will be provided to the employee for a period of time not to exceed four (4) years, or when one of the following events occur, whichever is sooner: the employee ceases to incur such expense; the employee violates any term of this relocation package; the employee's employment with the Company ends, whether voluntarily or otherwise; or the employee voluntarily chooses to transfer to another position within the Company.
5. Rent reimbursement will be offset if two or more employees rent the same living space.

ATTACHMENT C

GTW TRAIN DISPATCHER SENIORITY ROSTER

	Last Name	Initials	Seniority	
1.	Lustig	W. D.	1/09/1977	*
2.	Gebard	D.V.	04/19/1977	
3.	Facknitz	E.A.	05/22/1977	
4.	Frasure	R. D.	11/20/1981	*
5.	Campbell	L.P.	12/19/1981	
6.	McAfee	M.L.	02/07/1987	
7.	Mason	J.W.	11/30/1987	
8.	Maidment	S.D.	01/14/1990	
9.	Martenis	L.R.	06/02/1991	
10.	Spring	M.S.	11/13/1991	
11.	Iacoangeli	J. T.	03/06/1993	*
12.	Plumley	T.R.	03/07/1993	
13.	Maier	A.P.	10/19/1994	
14	Willett	T. E.	10/27/1994	*
15.	Evans	T.D.	12/03/1994	
16.	Seibert	R. L.	05/03/1997	*
17.	White	L.J.	06/05/1997	
18.	Skelton	S. D.	07/19/1997	*
19.	Wery	N.D.	09/06/1997	
20.	McDonough	K.E.	02/28/1998	
21.	Cowgar	K.M.	03/05/1998	
22.	Schott	J.F.	09/20/2000	
23.	Naylor	M. J.	04/23/2001	*
24.	Pollard	G. S.	06/29/2002	*

* Management

_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that GTW employees shall be allowed five (5) days with pay for the purpose of locating a residence in the Homewood area. Said five (5) days may be split up for up to two (2) house-hunting trip and shall be scheduled in conjunction with the employee's rest days. All travel expenses associated with the house-hunting trips shall be paid by the carrier. In lieu thereof, GTW employees may elect to receive a one-time lump sum payment of twenty-five hundred dollars (S2,500) to offset the costs associated with a familiarization/house hunting trip to the Homewood area. Employees electing the lump sum payment who do not relocate will have the twenty-five hundred dollars ($2,500) deducted from any future earnings or protective payments.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations

_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that rates of pay in effect for GTW train dispatchers at the time of the relocation shall be increased by ten percent (10%) in recognition of the increased cost of living in the Homewood area. This increase shall be effective on the first day the relocating train dispatchers work a position in the Homewood office.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations

_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that the carrier shall provide employment assistance for the spouses of the relocating train dispatchers at no cost to the employee or spouse. This shall include all costs associated with obtaining new employment in the Homewood area, including those costs associated with using employment agencies.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations

ATDA EXHIBIT D

OPINION OF THE COMMITTEE

I. INTRODUCTION

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the Norfolk Southern Corporation's application to acquire the Norfolk and Western Railway Company (NW), the Southern Railway Company (SR) and their affiliated and/or subsidiary railroad enterprises. Norfolk Southern Corporation-Control-Norfolk and Western Railway. Co. and Southern Railway, F.D. No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982). The SR did and does own all Central of Georgia Railroad Company (CG) stock. To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Norfolk Southern Corporation (NS), the NW and the SR pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347; 366 I.C.C. 173, 229-231 (1982).

Although Section 4 of the New York Dock Conditions contemplates adjudication by a single arbitrator, the parties agreed to establish this tripartite Arbitration Committee to decide this dispute.[1] The Arbitration Committee was formed under Section 4 without prejudice to the Organization's position that this Committee lacks jurisdiction over this case.

[1] All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

The Committee received pre-hearing submissions from both parties and it entertained extensive oral argument during the October 11, 1988 hearing. The parties elected to file post-hearing briefs which the Neutral Member received on or before December 7, 1988. At the Neutral Member's request, the parties waived the thirty-day time limitation, set forth in Section 4(a)(3) of the New York Dock Conditions, for issuing this decision.

II. BACKGROUND AND SUMMARY OF THE FACTS

The NW operates a signal repair shop at Roanoke, Virginia. SR and CG employees perform shop signal repairs for their respective railroads at a shop located in East Point, Georgia. While SR and CG workers perform signal repairs under a common roof, the East Point shop is not a coordinated facility. SR signalmen (currently four) repair SR signal devices and are governed by the SR Schedule Signalmen's Agreement while a CG Relay Repairman (presently one position) performs repairs on CG signal mechanisms under the CG Signalmen's Agreement.

On April 13, 1988, the Carriers notified the Organization of their "...plan to coordinate the work performed by Central of Georgia and Southern Railway signal employees in the East Point, Georgia Signal Relay Repair Shops into the Norfolk and Western Signal Relay Repair Shop at Roanoke, Virginia." The Carriers estimated that the coordination would result in the elimination of two Signalmen positions. The Carriers will reap substantial savings and economic efficiencies by having all NW, SR and CG signal shop repair work performed at Roanoke. Besides the

economics of scale associated with the coordination, the Carriers will make more productive use of the NW's Roanoke shop which is much newer than the East Point facility and has ample capacity to absorb the influx of SR and CG shop signal repair work. The parties stipulated that the planned coordination was not expressly stated in the Carriers' application to the ICC in the 1982 control case.

The parties held three days of face-to-face negotiations.[2] They met on May 25-26, 1988 and June 30, 1988. At the initial conference, the Carriers proposed an Implementing Agreement which merely affirmed that the New York Dock Conditions would apply to employees dismissed or displaced due to the coordination. Either shortly before or at the June 30, 1988 meeting, the Carriers embellished their prior proposal by giving East Point workers an opportunity to follow their work to Roanoke; permitting those employees who transferred to Roanoke to retain their SR or CG seniority; providing that the seniority dates of CG or SR workers who go to Roanoke be dovetailed into the NW Eastern Region Signalmen's seniority roster; and promulgated a "prior rights" process for filling subsequent vacancies at the coordinated facility. Under the Carriers' prior rights proposal, subsequent vacancies on any Roanoke position occupied by a worker, who had transferred from the SR or the CG, would be advertised across the

[2] The Organization conducted negotiations with the Carriers but reserved the right to later raise its jurisdictional contention. In its April 27, 1988 letters replying to the Carriers' April 13, 1988 notices, the Organization asserted that Section 4 of the New York Dock Conditions was inapplicable to the transfer of shop signal repair work.

NS system. Employees from the vacating incumbent's seniority district would hold a preferential right to the vacancy. The process would apply to each successive vacancy but a position would lose its "prior rights" status if no employee from the incumbent's seniority district bid on and filled the vacancy.

Prior to the June 30, 1988 conference, the Organization proffered a proposed implementing agreement which not only incorporated the New York Dock Conditions but also contained terms covering a plethora of other subjects. The Organization's proposed implementing agreement included terms which would grant signal workers pecuniary benefits in excess of those prescribed in the New York Dock Conditions; preserve the applicability of SR, NW and CG scope rules to signal repair work performed at the Roanoke Shop (presumably based on the property where the work originated);[3] provide that CG and SR employees who move to Roanoke would continue to work under their present CG or SR Schedule Agreements; prohibit the Carriers from contracting out any work covered by the scope of any one of the three schedule agreements; force the parties to negotiate a contract to clarify the implementing agreement before the Carriers place the

[3] Nonetheless, the Organization acknowledged that CG and SR signal repair work will be commingled with similar NW work at the coordinated facility. [TR 66, 81, 124] Consequently, the coordination will render it impossible to preserve these separate scope rules. The Organization further conceded that a Section 4 arbitration panel could write an implementing agreement which allows work to cross scope rule boundaries but the concession should not be construed as a relinquishment of the Organization's right to raise (in court) its fundamental argument that the ICC's New York Dock Conditions cannot abrogate, change, amend or delete any collective bargaining provision or any collective bargaining right. [TR 50, 90-91]

coordination into effect; automatically certify that all Roanoke signal shop workers are affected by the coordination and entitled to New York Dock benefits;[4] impose certain notice requirements on the Carriers; vest employees with benefits under other protective arrangements in lieu of New York Dock entitlements; and permanently allocate coordinated shop positions to the NW, SR and CG. The Organization also attached a Memorandum of Agreement to its proposal granting signal employees the exclusive right to perform all signal case wiring and/or fitting work although the Organization contends that current NW, SR and CG scope rules already cover such work. However, the Organization raised the signal case wiring issue for two reasons. First, two Public Law Boards adjudged that the NW's and SR's purchase of pre-wired signal cases did not violate the NW and SR scope rules. [See Public Law Board No. 2044, Award No. 4 (Van Wart) and Public Law Board No. 3244, Award No. 21 (Schienman)]. Second, the Organization successfully tied a similar Memorandum of Agreement

[4] At the arbitration hearing, the Organization explained that it did not intend to automatically certify all NW, CG and SR signal shop workers. Instead, the Organization wanted assurances from the Carriers that, if they were detrimentally affected now or in the future, Roanoke signal shop workers would have access to New York Dock benefits and any additional benefits contained in the implementing agreement. [TR 145-146] However, Section 2(a) of the Organization's proposed implementing agreement states that all named employees "...will be considered as adversely affected as a result of the implementation of the provisions of this Memorandum of Agreement...." The clear and unambiguous Section 2(a) language would establish an absolute presumption that all workers at Roanoke and East Point (even those who decline to follow their work) are adversely affected by the coordination. Nevertheless, the controversy is moot because the Organization realizes that only employees who are actually and adversely affected by the coordination are entitled to benefits.

to an April 14, 1987 New York Dock implementing agreement it negotiated (not arbitrated) with CSX Transportation, Inc.

While there is a factual conflict over whether or not the Carriers bargained in good faith, the parties concur that they each deemed the other's proposed implementing agreement unacceptable. Thereafter, the Carriers invoked interest arbitration pursuant to Section 4 of the New York Dock Conditions. The Carriers withdrew their second proposed implementing agreement and now ask this Committee to adopt an implementing agreement which is substantially similar to its original proposal. The Carriers' third proposal would permit East Point employees to bid on whatever new positions the NW established at Roanoke as a result of the coordination. (If the coordination will result in the elimination of two positions, the Carriers will only be creating three new positions at Roanoke.) If SR and CG employees at East Point transfer to Roanoke, their seniority would be dovetailed into the appropriate NW seniority roster. The Carriers' third proposal does not contain the retention of seniority and prior rights provisions found in their second proposal. Arbitration under Section 4 of the New York Dock Conditions is not final offer arbitration and, thus, the Carriers are free to retract proposals that they made in the quid pro quo spirit of negotiations. The Carriers are not estopped from urging this Committee to adopt their third proposal as the implementing agreement to cover this transaction. On the other hand, the Organization petitions us to adopt its implementing agreement which we described in the preceding paragraph.

III. STATEMENT OF THE ISSUES

This case raises three major issues:

1. Does this Committee have subject matter jurisdiction? Stated differently, is the Carriers' intended signal shop repair work coordination a transaction within the meaning of Section 1(a) of the New York Dock Conditions?

2. Did the Carriers negotiate in good faith with the Organization over the terms and conditions of an implementing agreement during the minimum thirty day bargaining period in accord with Section 4(a) of the New York Dock Conditions?

3. Assuming that this Committee has jurisdiction, what is the appropriate substantive content of an implementing agreement? An ancillary issue is whether transferring SR and CG employees will be governed by some or all the provisions of the SR or CG Schedule Signalmen's Agreements.

IV. THE POSITIONS OF THE PARTIES

A. <u>The Carriers' Position</u>

Although the instant signal shop repair coordination was not mentioned in the Carriers' application in the control case, it is the type of post-acquisition coordination which the ICC anticipated that the Carriers might implement subsequent to the ICC's approval of the acquisition. The ICC implicitly condoned future transactions which enhance operational efficiencies. The Commission understood that the Carriers would " ...realize a number of benefits related to coordination of shop and repair facilities...." 366 I.C.C. 173, 212. The ICC also observed that, "It is possible that further [employee] displacement may arise as

additional coordinations occur." [Brackets added for clarification] Id. at 230. In his November 26, 1980 verified statement, NW President Claytor informed the ICC that the Carriers might conduct future coordinations. The Organization quotes portions of the Carriers' application out of context. While the application suggested that the Carriers did not intend to coordinate signal work at Cincinnati, Ohio, they did not promise the ICC that they would never coordinate signal work elsewhere. In other railroad merger cases, the ICC has held that its approval in the control case extends to future coordinations which might reasonably be expected to flow from the original transaction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22), ICC Decision issued June 25, 1988. [See also, NW/SR v. ATDA, NYD § 4 Arb. (Harris; 5/19/87); affirmed, Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. 29430 (Sub-No. 20), ICC Decision dated May 24, 1988.] In the Union Pacific merger case, the ICC refused to condition future transfers of work on the carriers' attainment of the ICC's express approval following notice and an opportunity for hearing. Union Pacific Railroad-Control-Missouri Pacific Railroad, 366 I.C.C. 462, 622 (1982). The Organization admitted at the arbitration hearing that if the Carriers formally asked the ICC for authorization to coordinate the two signal shops, the ICC would summarily grant their request.

The Carriers sincerely attempted to reach a negotiated implementing agreement with the Organization. By providing signal employees on the CG and SR with prior rights, the Carriers

thought that its second proposal had addressed most of the Organization's concerns. Contrary to the Organization's allegation, the Carriers did not use this Section 4 arbitration proceeding as leverage to force the Organization to execute the Carriers' proposed implementing agreement. Similarly, the Carriers did not mislead the Organization into believing that the coordination encompassed solely relay repair work. The Carriers' April 13, 1988 notice indicated that all work performed by the East Point Signal Shop employees would be shifted to Roanoke. The Organization's bad faith bargaining charge is insulting. Out of 240 coordinations, the Carriers have had to resort to interest arbitration in only five instances. Due to the Organization's intransigence, a negotiated agreement was not possible in this particular case. The Organization broke off negotiations because the Carriers rightly refused to consider its Memorandum of Agreement which would bar the Carriers from purchasing prewired signal cases.

The Organization misunderstands the essence of this coordination. Following the movement of work from East Point to Roanoke, there will no longer be any CG or SR signal repair work. All signal shop repairs will be NW work. Since the work will be commingled, any device, regardless of whether it originated on the NW, SR or CG, will be repaired by an NW employee in the signal shop. The Carriers, not the Organization, design the parameters of the coordination and decide which property will perform shop signal repair work. Under the controlling carrier concept, the work is placed under the collective bargaining

agreement in effect at the location receiving the work. RYA v. MP/UP, NYD § 4 Arb. (Seidenberg; 5/18/83). Section 4 compels the parties to submit their disputes to binding interest arbitration so that the approved transaction can be consummated despite restrictions in existing collective bargaining agreements or employee rights under the Railway Labor Act. Denver and Rio Grande Western Railroad Company-Trackage Rights-Missouri Pacific Railroad Company, F.D. No. 3000 (Sub-No. 18), I.C.C. Decision dated October 19, 1983; Maine Central Railway Company, Georgia Pacific Corporation and Springfield Terminal Railway Company, Exemption from 49 U.S.C. 11342 and 11343, F.D. No. 30532, ICC Decision dated August 22, 1985. This Committee is absolutely bound to follow the ICC's pronouncement since it derives its authority from the Commission. United Transportation Union v. Norfolk and Western Railway Company, 822 F.2d 1114 (D.C. Cir. 1987). If SR and CG signalmen carried their respective schedule agreements with them to Roanoke, the Carriers would have to apply three separate pay, discipline, displacement and bidding provisions effectively nullifying any savings generated from the transaction. Of course, the Organization may handle the representation of the transferring employees as it sees fit but it cannot import the SR and CG Schedule Agreements to Roanoke.

The Carriers vehemently object to virtually every provision in the Organization's proposed implementing agreement. The Organization's proposals concerning signal case wiring and a ban on contracting out work are outside the ambit of negotiation and arbitration under Section 4 of the New York Dock Conditions.

These subjects do not concern the rearrangement of shop signal forces or the equitable selection of employees to perform the coordinated work. If the Organization wants to bargain about signal cases or subcontracting, it should serve a Section 6 notice under the Railway Labor Act. The Organization improperly seeks relocation expenses for transferring employees under Article XII of the January 12, 1982 National Signalmen's Agreement in lieu of less favorable expense reimbursements in the New York Dock Conditions because Article XII applies solely to intracarrier transfers. The Organization's implementing agreement designates each Roanoke shop position as an NW, SR or CG job. Such a provision serves to incorporate SR and CG seniority districts into the Roanoke Shop which is equivalent to carrying forward the CG and SR Schedule Agreements. The Organization is also half-heartedly attempting to dictate the number of positions the Carriers must maintain in the coordinated facility. The Organization is again invading management's prerogative to determine the parameters of the transaction. Moreover, the Organization's proposal is unworkable since whenever a displacement occurs, say on the SR, the SR employee could bump a Roanoke Shop worker compelling him to move to a faraway point on the SR system. Sections 5 and 11 of the Organization's proposed implementing agreement are unacceptable because they would require the parties to reach another contract before the Carriers could effectuate the coordination. There is no language in the New York Dock Conditions allowing the Organization to postpone implementation of the coordination once

an implementing agreement is negotiated or arbitrated. Side Letter No. 1 and Section 6 of the Organization's implementing agreement would grant employees per diem relocation and real estate benefits well beyond those specified in the New York Dock Conditions. Finally, the Organization's proposal raises a number of issues which are within the exclusive province of a Section 11 arbitration committee. Section 11 insures that current employees are protected should this coordination affect them sometime in the future.

While the Organization's implementing agreement is highly inappropriate, the Carriers' proposal presented to this Arbitration Committee conforms to the requirements of Section 4. The Carriers' implementing agreement contains an equitable method for filling new positions at the coordinated facility. It specifically permits current East Point employees to bid on the new Roanoke positions. Since their work is being moved to Roanoke, East Point Signalmen should have an opportunity to follow their work. The Carriers' prior rights provision included in their second proposed implementing agreement is unnecessary to achieve an equitable rearrangement of forces at the coordinated facility.

B. <u>The Organization's Position</u>

Inasmuch as the Carriers failed to specifically mention the combining of SR, CG and NW shop signal work in their ICC application, the intended coordination is not a transaction as defined in Section 1(a) of the New York Dock Conditions. Section 1(a) unambiguously stated that a transaction is an activity

"...taken pursuant to authorizations of this Commission...." Simply put, the ICC never approved the coordination of East Point Shop signal repair work into the NW's Roanoke facility. Absent a transaction, the Carriers may not invoke the New York Dock Conditions as a vehicle to change existing collective bargaining agreements. SSR v. BMWE, NYD § 4 Arb. (Zumas; 8/20/83). In their application, the Carriers represented to the ICC that there would be no mass relocation of workers and that employee displacements would end about six months following the NS's acquisition of the NW and SR. The ICC, in its approval, confirmed that there would be "...no wholesale disruption of the carriers' work force...." 366 I.C.C. 173, 230. The Carriers further promised the ICC that, "No change in Southern's existing communications and signal facilities are planned." Id. at 204. SR President H. H. Hall, in his November 28, 1980 verified statement to the ICC, forecasted the complete coordination of NW and SR sales, finance, and public affairs offices but the NW and SR would otherwise continue to operate as separate entities. At the time of their application, the Carriers promulgated a table of positions to be transferred which notably makes no allusion to signalmen or signal repair shops. Based on the Carriers' representations, the ICC logically concluded that signal work would be unaffected by the acquisition. The CSX case relied on by the Carriers is of dubious validity since one Commissioner opined that the parties could not agree to vest a Section 4 arbitrator with subject matter jurisdiction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22), ICC Decision

issued June 25, 1988 and dissenting opinion subsequently issued. It is ludicrous to characterize the coordination as a transaction arising under the 1982 control case because the Carriers served their notice more than seven years after the ICC's approval. It is equally ridiculous to imply that the Carriers originally intended to coordinate the signal shops back in 1982. Since they admittedly had no such intention, the ICC could hardly approve of the coordination by implication. Upon application, the ICC undoubtedly would authorize the signal shop coordination, but the Carriers must still abide by the ICC's admonition that "No change or modification shall be made in the terms and conditions approved in the authorized applications without the prior approval of the Commission." [Emphasis added.] 366 I.C.C. 173, 255. Since an approved transaction has not materialized, the New York Dock Conditions are inapplicable.

Assuming, arguendo, that the Committee decides that the coordination is a New York Dock transaction, exercising jurisdiction over this dispute is premature because the Carriers' bad faith bargaining prevented the parties from conducting meaningful negotiations over the terms and conditions of an implementing agreement. The Carriers stubbornly refused to discuss the Organization's proposal. Instead, they gave the Organization an ultimatum: either capitulate and agree to the Carriers' proposed implementing agreement or arbitrate. The Organization views the New York Dock Conditions as the floor or starting point for negotiations. If the employees were entitled to the minimal benefits set forth in the New York Dock Conditions

and nothing more, there would be no reason for the ICC to mandate a thirty-day period for negotiations. The Organization's proposed implementing agreement, albeit containing some items outside the ordinary purview of New York Dock Conditions, was designed to provide a reasonable level of protective benefits to the involved employees. The proposal was not out of line with New York Dock implementing contracts that this Organization has negotiated on other properties. Moreover, the Organization's negotiators were confused as to the precise parameters of the work to be transferred to Roanoke. The Carriers hinted that they were coordinating only signal relay repair work raising the Organization's legitimate suspicion that the Carriers planned to contract out other types of shop signal repair work. It is regrettable that the parties had to resort to arbitration because many of the areas of disagreement could have been resolved if the Carriers had simply been willing to consider some of the Organization's proposals. This Committee should order the parties to return to the negotiating table so they can endeavor to reach a negotiated implementing agreement.[5]

The Organization realizes that a Section 4 arbitrator may modify or override the terms of collective bargaining agreements

[5] This statement is the Organization's requested remedy for the Carriers' alleged bad faith bargaining. Presumably, the Organization contemplates that we would retain jurisdiction over this case and later determine the contents of an implementing agreement if good faith negotiations do not result in a negotiated implementing contract. The Organization did not argue that, in the absence of good faith negotiations for the period specified in Section 4 of the New York Dock Conditions, this Committee is deprived of its original jurisdiction over the case and that to reinstate the Section 4 process, the Carriers would have to serve new Section 4 notices.

to the extent necessary for the Carriers to consummate the transaction. 49 U.S.C. § 11341(a). However, the exemption from the Railway Labor Act is not limitless. In this case, the transaction can accommodate a continuation of some of the rules in the CG and SR Schedule Agreements. Specifically, carrying forward pay, discipline and other comparable provisions from the SR and CG Schedule Agreements would not bar the transaction. Preserving most of the CG and SR agreements and allowing transferring workers to maintain their status as CG or SR employees in the coordinated facility would not impede the Carriers from efficiently operating the Roanoke Shop just as CG employees and SR workers have been efficiently performing signal repair work under a common roof at East Point. Although the work at the coordinated facility will be placed under the NW scope rule, the implementing agreement should still provide some reciprocal terms to exclusively reserve the work for the signal craft. This Committee would be impermissibly narrowing the CG and SR scope rules if it forever took the work away from the employees on those properties. Thus, despite the commingling of shop signal repair work, the positions at Roanoke should be allocated to employees on the NW, SR, and CG. Each position can perform any signal repair work but SR and CG employees should have a continuing opportunity to work in the Roanoke shops especially since the genesis of some of the work will be within the SR or CG systems. More importantly, the Organization is concerned that the Carriers are using this coordination as a subterfuge to contract out signal repair work. If work is

currently reserved exclusively to signal workers by the scope rule in the SR agreement, the Organization fears that placing the work under the NW agreement will allow the Carriers to claim that such work is no longer reserved solely to the signal craft. Also, there is the possibility that work could be subject to the SR scope rule but be outside the boundary of the NW scope rule. A Section 4 arbitration cannot be utilized as a pretext for interest arbitration under the Railway Labor Act. SR v. BRS, NYD § 4 Arb. (Fredenberger; 10/5/82). Suffice it to say, the ICC has never taken the extreme position that the New York Dock Conditions can be used as a tool to extinguish existing collective bargaining agreements.

Finally, the Organization's proposed implementing agreement incorporates terms which will equitably govern the coordination. The Carriers should be obligated to notify employees of the possibility that they could be entitled to New York Dock benefits. The Carriers must inform signal employees about where and how to file claims so that the Carriers do not chill their entitlement to New York Dock benefits. If the Carriers correspond with an individual worker with regard to this coordination, it should send a copy to the Organization's General Chairman. The Organization is not advocating that the parties negotiate a second implementing agreement but it simply seeks an agreed upon clarification of the implementing agreement to avoid any future misunderstandings. Also, the Carriers must assure the Organization that if any NW, SR or CG signal worker is affected by this coordination, the employee will have access to protective

benefits provided by the implementing agreement. The Carriers, on the other hand, are attempting to restrict their liability to a small group of employees, that is, those workers who transfer from East Point to Roanoke. Lastly, the implementing agreement should contain a prohibition against subcontracting out the coordinated work to prevent the Carriers from using the New York Dock Conditions as a pretext for evading the scope rules. If, as the Carriers contend, all signal shop repair work will be performed by employees at Roanoke, the Carriers cannot take any exception to a provision which will reserve the work exclusively to the signal craft.

V. DISCUSSION

A. Jurisdiction

The threshold question is whether or not the coordination of shop signal repair work is a transaction within the meaning of Section 1(a) of the New York Dock Conditions. As the parties stipulated, neither the Carriers' application nor the ICC's approval in the control case expressly described the coordination of CG and SR East Point signal repair work into the NW's Roanoke shop. In addition, the record does not contain any evidence demonstrating that the Carriers held any unexpressed intent to transfer signal shop work from East Point to Roanoke at the time the ICC approved the NS acquisition. Thus, as the Organization stresses, this Committee is confronted with deciding whether or not the transfer of signal work is a New York Dock transaction when 1) the transfer was not expressly alluded to in the contro. case; and 2) the Carriers lacked any original intent to

coordinate signal shop repair work when the ICC approved the control case. Put differently, the issue becomes whether or not the Carriers' action, planned six years after the control case, constitutes a New York Dock transaction.

Section 1(a) defines a transaction as "...any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." A careful reading of the literal definition reveals that not every action need be approved by the Commission to attain status as a New York Dock transaction. The words "taken pursuant to" does not connote that the Carriers must obtain the ICC's express approval for each and every transaction. Rather, the definition contemplates that there must be a rationale nexus between the Carriers' action and the Commission's approval in the original control case.

Consistent with the Section 1(a) definition, the ICC has ruled that the Carriers need not obtain the Commission's prior approval to engage in an activity which was not expressly embraced in the control case so long as it is "...the type of action that might reasonably be expected to flow from the control transaction." Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. No. 29430 (Sub-No. 20); ICC Decision dated May 24, 1988; (Affirming NW/SR v. ATDA, NYD § 4 Arb. (Harris; 5/19/87). The ICC's ruling means that some carrier actions are transactions because they fall within the penumbra of the control case.

The signal shop repair work consolidation is the type of action that the Carriers could reasonably be expected to pursue

under the auspices of the control case inasmuch as the Carriers will accrue the same economic savings that the acquisition was designed to achieve and the coordination will provide the public with more efficient and affordable rail service. Since the private and public benefits of the coordination conform to the goals of the NS acquisition, the signal shop repair coordination is clearly premised on the Commission's authorization. Indeed, the Organization indirectly concedes that the coordination naturally flows from the control transaction because it acknowledged that if the Carriers were to make application, the ICC would quickly and routinely approve the signal shop repair work coordination. [TR 37]

Nevertheless, the Organization argues that regardless of whether the coordination reasonably flows from the control case, the Carriers promised the ICC that they did not plan to coordinate signal facilities. There is some doubt that the Carriers made such a broad representation to the ICC. NW President Claytor, in his November 26, 1980 verified statement, declared that there might be "...further coordination of functions over time..." aside from those coordinations detailed in the Carriers' operating plans presented to the ICC. Apparently, the Carriers' application and the ICC's opinion approving the acquisition dwelled extensively on NW-SR common point consolidations. However, the ICC never precluded the possibility that the Carrier would engage in some unspecified future coordinations involving non-contiguous points pursuant to the original authorization. The ICC wrote:

> ...the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions. 366 I.C.C. 173, 230.

Even though the Carriers told the Commission that they did not intend to coordinate signal work at Cincinnati, Ohio, a common point, the Organization did not cite any representation (made by the Carriers) that all signal employees would be immune from any future coordination. The above quote shows that the ICC foresaw that the Carriers might engage in future transactions that did not involve mass employee relocations. The coordination of shop signal repair work at Roanoke will only cause the abolition of five East Point positions which can hardly be characterized as a wholesale disruption of the Carriers' work force.

This Committee finds, as a matter of fact, that the Carriers' intended coordination of East Point signal shop repair work into the NW's Roanoke facility constitutes a transaction within the meaning of Section 1(a) of the New York Dock Conditions.

B. Implementing Agreement Negotiations

The compulsory negotiating period, which the ICC incorporated into Section 4(a) of the New York Dock Conditions, promotes the preferred labor-management policy of encouraging the parties to reach an agreement of their own accord without the necessity for outside intervention. The Section 4(a) interest arbitration provision fulfills a two-fold purpose. First,

arbitration prevents delays in transaction implementation. A carrier is able to obtain an implementing agreement, the condition precedent to effectuation of the transaction, should a labor organization refuse to negotiate in an effort to block the transaction. Second, the arbitration requirement impels the parties to reach a consensus to avoid the inherent risks of handing their dispute to a third party. Therefore, we agree with the Organization that Section 4(a) of the New York Dock Conditions contemplates that the parties will conduct meaningful, good faith negotiations.

Good faith bargaining is an amorphous principle. A party to negotiations is not guilty of bad faith bargaining simply because the parties were unable to reach an agreement. The duty to bargain in good faith is not equivalent to an obligation to reach an agreement. Therefore, a breakdown in negotiations does not raise any presumption that one party engaged in bad faith bargaining.

The Organization initially charges that the Carriers bargained in bad faith because they adamantly refused to even discuss the Organization's proposed implementing agreement. Despite this allegation, the Organization admitted at the arbitration hearing that the parties spent considerable time reviewing the Organization's proposal. [TR 114-115] Most importantly, the Carriers' second proposed implementing agreement shows that not only did the parties extensively discuss the Organization's concerns about the coordination, but also the

Carriers were open to compromises. Thus, there is no merit to the Organization's allegation that the Carrier issued the Organization an ultimatum (sign our agreement or arbitrate).

The crux of the Organization's bad faith bargaining charge arises from the Carriers' reluctance to consider subjects which they believed were outside the ambit of negotiating a New York Dock implementing agreement. The Organization became frustrated because the Carriers were reluctant to negotiate over the Organization's Memorandum of Agreement regarding the wiring and fitting of signal cases. The Organization also sought monetary benefits in excess of those provided by the New York Dock Conditions.

Under Section 4(a), the parties are obligated to bargain about the selection of forces involved in the transaction and an equitable arrangement for the assignment of employees based on the surrounding circumstances of each transaction. In addition, the parties also bargain about how the New York Dock Conditions will apply. Signal case wiring is not a mandatory bargaining subject under Section 4(a). Rather, it is a permissive bargaining subject.[6] The parties are free to bargain over subjects beyond the purview of Section 4(a), including pecuniary benefits above the level specified in the New York Dock Conditions, but there is no legal obligation (at least in the New

[6] While the Organization's proposal that would effectively prohibit the Carriers from purchasing prewired signal cases is a permissive subject for bargaining under Section 4(a) of the New York Dock Conditions, it is a mandatory bargaining subject under Section 6 of the Railway Labor Act.

York Dock Conditions) for either party to bargain about a permissive bargaining subject.[7] If the parties reach impasse on a permissive subject, a Section 4 arbitrator is without authority to resolve the deadlock. Since the arbitrator could not resolve the impasse, the Organization could hold every transaction hostage to demands wholly unrelated to the selection and rearrangement of forces. While the Organization entered into New York Dock implementing agreements containing terms which addressed permissive bargaining subjects on other railroad properties, these were negotiated as opposed to arbitrated implementing agreements.

Because of the nomenclature (the titles of the shops) in the Carriers' April 13, 1988 notice, the Organization incorrectly formed the impression that the transaction governed only relay repair work. The notice, however, clearly stated that all East Point signal repair work will be coordinated into Roanoke. Moreover, the confusion generated by the name of the East Point

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[7] The parties may agree to include in their implementing agreement monetary benefits in excess of those in the New York Dock Conditions, but an arbitrator is bound by the level of benefits set forth in the New York Dock Conditions. SR/NW v. BRAC, NYD § 4 Arb. (LaRocco; 7/17/84); But see, BM/MC v. ATDA, NYD § 4 Arb. (Sickles; 8/6/85). Although the ICC confirms that a Section 4 arbitrator is limited by the Commission mandated level of protection, it has suggested that there may be benefits that draw their essence from the New York Dock Conditions without being specifically enumerated therein. Such benefits would be mandatory subjects for bargaining and a Section 4 arbitrator could include such benefits in an implementing agreement. See Footnote 10 in the ICC's May 24, 1988 decision Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. 29430 (Sub-No. 20).

and Roanoke facilities did not hamper negotiations. The Carriers' three proposed implementing agreements as well as the Organization's proposed implementing agreement provided for the coordination of all East Point shop signal repair work with identical work at the Roanoke facility.

In summary, both parties exerted sincere efforts toward reaching an agreement. It follows that this Committee has jurisdiction to fashion an implementing agreement to govern the coordination of shop signal repair work.

C. The Appropriate Contents of an Implementing Agreement.

a. The Applicability of SR and CG Schedule Agreements.

When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroads. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the Organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR Schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would

totally thwart the transaction. The Carriers persuasively argued that they could never attain operational efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements. The ICC has unequivocally ruled that existing collective bargaining agreements are superseded by the necessity to implement the approved transaction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22); ICC Decision issued June 25, 1988. The ICC broadly interprets the statutory clause exempting approved transactions from other laws including the Railway Labor Act. Id. Maine Central Railroad and Springfield Terminal Railway Co., F.D. 30532; ICC Decision dated August 22, 1985; 49 U.S.C. 11341(a). In the Maine Central case, the ICC observed, "Such a result is essential if transactions approved by us are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements affecting changes in working conditions necessary to implement those transactions." Maine Central, supra at 7. The approved transaction is exempt from all legal obstacles under the self-executing operation of Section 11341 of the Interstate Commerce Act. Brotherhood of Locomotive Engineers v. Boston and Maine Corporation, 788 F.2d 794, 800-801 (1st Cir. 1986).

This Committee is a quasi-judicial extension of the ICC and thus we are bound to apply the ICC's interpretation of the Interstate Commerce Act and the New York Dock Conditions. United Transportation Union v. Norfolk and Western Railway Co., 822 F.2d

1114, 1120 (D.C. Cir. 1987). The ICC's authoritative announcements that existing collective bargaining agreements and collective bargaining rights must give way to the approved transaction does not warrant extensive analysis. Suffice it to say, that the Organization clings to an old line of arbitral authority which the ICC overruled in Maine Central Railroad and Springfield Terminal Railway Co., F.D. 30532; ICC Decision dated August 22, 1985 and Denver, Rio Grande and Western Railroad-Trackage Rights-Missouri Pacific Railroad, F. D. 30000 (Sub-No. 18); ICC Decision issued October 19, 1983.[8]

The controlling carrier concept provides that the collective bargaining agreement in effect on the railroad receiving the work, in this case the NW, will thereafter govern the work and workers at the coordinated facility. RYA v. MP/UP, NYD § 4 Arb. (Seidenberg; 5/18/83). UP/MP v. UTU, NYD § 4 Arb. (Brown; 1/85).

While the NW Schedule Signalmen's Agreement will apply to the work and workers at the NW facility to accommodate the transaction, we need to address the Organization's allegation that the Carriers are engaging in the transaction to circumvent the scope rules in the CG and SR agreements. The Carriers may

[8] For example, for the proposition that a Section 4 arbitrator may not modify, vitiate or change existing collective bargaining agreements, the Organization relies heavily on SR v. BRS, NYD § 4 Arb. (Fredenberger; 10/5/82) which followed the Illinois Terminal Trilogy. Subsequent to the Denver, Rio Grande and Maine Central decisions, Section 4 arbitrators have consistently held that they have the authority to override existing collective bargaining agreements where those agreements undermine the transaction. SR/NW v. BRAC, NYD § 4 Arb. (LaRocco; 7/17/84); SR/ICG v. UTU, NYD § 4 Arb. (Harris; 5/2/88); BLE v. UP/MP, NYD § 4 Arb. (Seidenberg; 1/17/85); UP/WP v. ATDA, NYD § 4 Arb. (Fredenberger; 5/27/84); and BRC v. CSX/C&O, NYD § 4 Arb. (LaRocco; 3/23/87).

not invoke the New York Dock Conditions where their sole objective is to change an existing collective bargaining agreement. It cannot construct a sham transaction to circumvent Section 6 of the Railway Labor Act. SSR v. BMWE, NYD § 4 Arb. (Zumas; 8/20/83). However, the Organization has not come forward with any evidence proving that the Carriers intend to shift work from East Point to Roanoke and then to contract out work which they could not have farmed out to an outsider if the work remained at East Point. Put differently, we do not find any evidence that the transaction is motivated by the Carriers' desire to circumvent onerous collective bargaining agreement provisions. Nevertheless, we will reserve to the Organization the right to progress a claim under Section 11 of the New York Dock Conditions that an employee was adversely affected by the coordination because the Carriers used the coordination as a pretext for contracting out work belonging exclusively to the signal craft. In other words, employees adversely affected by this transaction will be covered by the New York Dock Conditions even if the adverse effect (emanating from the transaction) arises sometime after the Carriers implement the coordination. Since such a right is already contained in the New York Dock Conditions, it is unnecessary to include a separate clause incorporating this right into the implementing agreement.

b. Other Items to be Included in the Implementing Agreement

At the arbitration hearing, the parties concurred that Section 10 of the Organization's proposed implementing agreement shall be included in the implementing agreement. [TR 192]

While the Carriers resisted the inclusion of Section 2(b) of the Organization's implementing agreement in both its pre-hearing and post-hearing submissions, the Carriers declared, at the arbitration hearing, that they did not have a problem with the election of benefits component of Section 2(b). [TR 149-150] Therefore, the parties should adopt the last two sentences of Section 2(b) of the Organization's proposal with the following modifications. The introductory phrase in the second sentence shall be replaced with: "If an employee is entitled to benefits under this agreement and one or more other protective arrangements,..." In the final sentence of Section 2(b) the words "within a reasonable period" should be substituted for "during the period set forth in this paragraph (b)." The implementing agreement shall not contain the first sentence of Section 2(b) inasmuch as the New York Dock Conditions do not require the Carriers to ferret out employees who are potentially entitled to New York Dock benefits. Such a provision is unnecessary and does not prejudice an affected worker inasmuch as Section 11 does not contain any fixed time deadlines for instituting a claim for New York Dock benefits.

With regard to Section 9 of the Organization's proposed implementing agreement, the parties concur that the Carriers should supply those employees who presently work at the East Point or Roanoke signal shops (as well as those workers who fill new jobs established at the Roanoke shop) with a copy of the implementing agreement within thirty days after implementation of the transaction. [TR 191]

The Carriers and the Organization agreed that the implementing contract should include a provision that the Carriers shall handle employee claims using the standard procedure customarily followed by the Carriers in protection matters. The Carriers shall notify the Organization if there is a change in the identity of the designated officer who handles protective claims under the implementing agreement. However, the implementing agreement should not rigidly include any particular claim form or claim procedure. [TR 182]

During our discussion of the jurisdictional question, the bargaining issue and the applicability of the SR and CG Schedule Agreements, this Committee made it abundantly clear that most of the substantive items in the Organization's proposed implementing agreement are inappropriate for an arbitrated implementing agreement. Therefore, the implementing agreement shall not contain a prohibition against subcontracting out or any rider pertaining to signal case wiring. In addition, we must exclude from the implementing agreement any terminology which would operate to allow employees transferring from East Point to Roanoke to continue working under the SR or CG Schedule Agreements. Also, this Committee lacks the authority to provide the Organization with monetary benefits in excess of the minimum level set forth in the New York Dock Conditions. Thus, the implementing agreement shall not contain the Organization's proposals relating to additional per diem benefits, real estate expense reimbursements and other relocation expenses. Unless

expressly stated in our Opinion, we reject the provisions of the Organization's proposed implementing agreement.

Since we are applying the controlling carrier concept to this transaction, those CG and SR employees who bid on and transfer to Roanoke shall have their seniority dovetailed into the appropriate regional signalmen roster on the NW.[9] It would be unworkable to permit other SR and CG employees to have the right to displace workers who transfer from the CG or SR to Roanoke. Reciprocally, the employees transferring to Roanoke from the SR and CG shall not retain any seniority rights on their former carrier.

Sections 3(a) through 3(d) of the Organization's proposed implementing agreement manifest the Organization's attempt to dictate the number of positions that the Carriers must maintain in the coordinated facility. The number of positions to be established at the coordinated facility is the Carriers' prerogative. However, the Organization convincingly argues that the implementing agreement should contain an equitable recognition that shop signal repair work flowing into the coordinated facility will be coming from the SR and CG as well as the NW. The prior rights provision, as drafted by the Carriers in their second proposed implementing agreement, constitutes a suitable rearrangement of forces for this particular transaction. BRC v. C&O/SR, NYD § 4 Arb. (Marx; 12/5/84). Filling subsequent

[9] The Organization may still have these former SR and CG employees represented by the General Chairman on their former property. This Committee will not intrude into internal union affairs.

vacancies at the coordinated facility with SR or CG signal workers (who voluntarily transfer and would have been able to bid on the positions if they had remained at East Point) when the vacating incumbent came from the SR or CG is a sufficient acknowledgment that the coordination involves SR and CG shop signal work. Thus, the implementing agreement shall incorporate the Carriers' prior rights language found in its second proposed agreement but without the provision allowing the transferring employees to retain their SR or CG seniority.

It would be superfluous and redundant to require the parties to enter into a contract overlaying their implementing agreement prior to effectuation of the transaction. The Organization has failed to cite any provision of the New York Dock Conditions that compels the parties to negotiate a second contract clarifying the terms and conditions of the implementing agreement. Should the parties disagree over the interpretation or application of the implementing agreement, either party may progress the dispute to arbitration under Section 11 of the New York Dock Conditions.

Finally, this Committee notes that the Carriers derived their five-day notice provision, contained in Article I, Section 1 of their proposed agreement, from the Schedule Agreements which provide for five days advance notification of job abolishments. In its proposed implementing agreement, the Organization sought a thirty day notification period. In this case, the employees have been aware of the impending transaction since April, 1988, and thus thirty days additional notice is unwarranted. However, regardless of the terms of the SR and CG Schedule Agreements,

East Point workers should be afforded five working days notice of implementation of the transaction. Five working days notice is especially appropriate for shop employees. Thus, the word "working" should be inserted after "(5)" in Article I, Section 1 of the Carriers' proposal.

In conclusion, the parties shall adopt the Carriers' third proposed implementing agreement with the additions and modifications enunciated in our Opinion.

AWARD AND ORDER

This Arbitration Committee renders the following Award:

1. This Committee has jurisdiction over the subject matter of this dispute and finds, as a matter of fact, that the Carriers' intended coordination of East Point and Roanoke shop signal repair work is a transaction within the meaning of Section 1(a) of the New York Dock Conditions.

2. The parties shall enter into an implementing agreement consistent with the Opinion. The parties shall adopt the Carriers' third proposed implementing agreement, making the amendments and modifications as specified herein.

3. The parties shall comply with this Award within thirty days of the date stated below provided, this thirty day time period shall not delay the Carriers' implementation of the transaction upon proper notice.

DATED: February 9, 1989

W. D. Pickett
Employees' Member

Mark R. MacMahon
Carrier Member

John B. LaRocco
Neutral Member

LABOR MEMBER'S DISSENT
to
THE OPINION AND AWARD
INCLUDING THE ROANOKE SIGNAL SHOP COORDINATION

In the matter of arbitration hearing between:

Norfolk & Western Railway Company, Southern Railway Company
and Central of Georgia Railroad Company

vs.

Brotherhood of Railroad Signalmen

For your information and file. VMS 4-24-89
cc: C. R. Vaught, General Chairman
V. J. Sartini, General Chairman
M. R. MacMahon, Carrier Member
J. B. LaRocco, Neutral Member
W. D. Pickett, Employees' Member

We must take issue with the factual findings of the arbitrator, we believe that such findings are non-sequester and contrary to the evidence presented at the arbitration hearing.

The arbitrator's reprobative indictment has failed to recognize the established line of demarcation between his so called "quasi-judicial extension of the ICC" and the ICC's assumption that it somehow has the authority to override and/or circumvent the Railway Labor Act or provisions as set forth in the New York Dock Conditions. Contrary to the arbitrator's allegation wherein he stated that "Suffice it to say, that the Organization clings to an old line of arbitral authority which the ICC overruled in Main Central Railroad and Springfield Terminal Railway Co., F.D. 30532; ICC decision dated August 22, 1985 and Denver, Rio Grande and Western Railroad-trackage Rights-Missouri Pacific Railroad, F.D. 30000 (Sub-No.18); ICC decision issued October 19, 1983." It is obvious that we seem to be involved in a game of one-upmanship. Therefore, in repudiation, one must merely look at several recent U.S. District Court decisions wherein they have held that the ICC does not have the express authority to deviate or allow exemptions which are mandated by the Railway Labor Act. As stated by U.S. District Court Judge Paul G. Hatfield in a ruling on the Butte, Anaconda and Pacific Railway Co., Montana vs. Railway Labor Executives Association, et al. CV-85-073-BU-PGH, dated February 2, 1989, "The ICC has no express authority to exempt transactions from the requirements of any other federal statutes".

In a decision rendered by United States District Court, Judge Block, Re: Railway Labor Executives Association vs. Pittsburgh & Lake Erie Railroad Company, Civil Action No. 87-1745, dated March 29, 1987:

* * * * *

"This Court concludes that the mere fact that Congress has granted the ICC broad authority to regulate the transportation industry cannot be read to imply that Congress intended to annul the provisions of the RLA, particularly in light of the strong Congressional policies underlying the RLA, Union Pacific Railroad Company v. Sheehan, supra."

There is no proper or rational basis for supporting the Carrier's overt actions to circumvent the Railway Labor Act and the separate schedule Agreements or for the arbitrator to sanction such action. The unfounded reasoning by the referee has done nothing more than to camouflage both the facts and circumstances of this case. As indicated in the facts of this case, the Carrier's application, and the ICC decision under Finance Docket No. 29430 were completely void of any reference or indication that the Carrier remotely contemplated the consolidation of the signal shops, a fact detailed in a notarized statement by Carrier's President Robert B. Claytor, Re: Finance Docket 29430. "...There are, of course, existing plans for some coordination of operations, set out in detail in the operating plan, with further coordination of functions over time, but, apart from the necessary consolidation of the sales functions, described in Mr. Hall's statement, at this time we do not plan any consolidations of other departments or mass relocation of employees in implementing our plan." (Emphasis added) Mr. Claytor's statement, along with ICC's decision in Finance docket 29430, wherein their only reference to signal force changes indicated that "no change in Southern's existing communications and signal facilities are planned." Therefore, these statements clearly decree that absolutely no changes in signal facilties were anticipated by the Carrier or sanctioned by the ICC under Finance Docket 29430 and as stated within the ICC order, "No change or

modifications shall be made in the terms and conditions approved in the authorized applications without prior approval of the commission." (Emphasis added)

The impropriety of the referee's decision is clearly demonstrated, wherein, he has acknowledged that, "as the parties stipulated, neither the Carriers' application nor the ICC's approval in the control case expressly described the coordination of CG and SR East Point signal repair work into the NW's Roanoke shop. In addition, the record does not contain any evidence demonstrating that the Carriers held any unexpressed intent to transfer signal shop work from East Point to Roanoke at the time the ICC approved the NS acquisition. Thus, as the Organization stresses, this Committee is confronted with deciding whether or not the transfer of signal work is a New York Dock transaction when 1) the transfer was not expressly alluded to in the control case; and 2) the Carriers lacked any original intent to coordinate signal shop repair work when the ICC approved the control case. Put differently, the issue becomes whether or not the Carriers' action, planned six years after the control case, constitutes a New York Dock transaction."

The referee's opinion and award is a contradiction of facts and logic, and flies in the face of unrefutable evidence presented on the property and at the arbitration hearing; as clearly defined in New York Dock Conditions Article I Section 1 (9), "'transaction' means any action taken pursuant to authorizations of this Commission to which these provisions have been imposed."

The obvious fact remains, as acknowledged by all parties to this dispute, that the Carrier lacked approval from the ICC to coordinate and consolidate its signal shops. Therefore, this so-called transaction clearly falls under the provisions of the Railway Labor Act under General Duties - Seventh; "No carrier, its officers or agents shall change the rates of pay, rules, or

working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." As clearly demonstrated, the Carrier's actions, with the arbitrators blessings, have violated not only the provisions of the New York Dock Conditions but the once sacrosanctity of the Railway Labor Act.

The arbitration panel should have additionally dismissed this dispute on the grounds it did not have jurisdiction; based on the fact that the Carrier failed and refused to bargain in good faith, as mandated in New York Dock and the Railroad Labor Act.

The fundamental facts in this case clearly demonstrate that the opinion and award is palpably erroneous.

Organization Member,

W. D. Pickett

W. D. Pickett, Vice President

ATDA EXHIBIT E

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS

In the matter of ICC Finance Docket No. 32549, Decision No. 38, between **Burlington Northern Santa Fe Railway Company** -and- **Brotherhood of Maintenance of Way Employes**	**DECISION**

Before
Joseph A. Sickles, Arbitrator
March 25, 1999

APPEARANCES:

For the Railway Company: Wendell Bell
General Director, Labor Relations

For the Brotherhood: Donald F. Griffin
Assistant General Counsel

BACKGROUND INFORMATION

The Interstate Commerce Commission (ICC), the predecessor agency of the Surface Transportation Board (STB), approved a merger and consolidation of the Burlington Northern Railroad Co. (BN) and the Atchison, Topeka and Santa Fe Railway Co. (SF) on August 16, 1995 (ICC Finance Docket No. 32549, Decision No. 38). The ICC imposed the *New York Dock* labor protective conditions for affected employees. The merged railway company (BNSF or the Carrier) thereafter began consolidating the operations of the two railroads. Clerical forces, mechanical forces, common yards, common road operations, yardmasters, and dispatchers were consolidated.

However, the maintenance of way operations of the BN and the SF had remained essentially separate, except for a November 1996 agreement integrating the regional and system gang operations.

On April 7, 1998, the Carrier notified the Brotherhood of Maintenance of Way Employes (BMWE), the bargaining representative of the maintenance of way employees for both the BN and the SF, of its plans to consolidate and integrate the seniority districts from the two lines. BNSF wanted to consolidate the existing 47 seniority districts over 34,000 miles of merged track into nine districts. The notice was served under the procedures of both Article I, Section 4, of *New York Dock* and Article XII of the Imposed Agreement of Presidential Emergency Board (PEB) No. 219.[1]

The parties agreed in June 1998 that the main part of the proposed consolidation would proceed under Article XII,[2] and the consolidations at nine common points would proceed under the *New York Dock* mechanism.

In August 1998, the parties concurred on the rearrangement of seniority districts in the Houston area. However, they were unable to conclude agreements at the other eight common-point locations:

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[1] *New York Dock* provides procedures (notification, negotiation, and binding arbitration if necessary) for protecting the interests of all employees affected by a government-approved merger or consolidation. PEB 219 provides comparable procedures for realigning seniority districts of maintenance of way and signal employees.

[2] Arbitrator Richard Mittenthal was appointed to conduct the Article XII proceedings, and he issued his award on March 11, 1999.

Amarillo, Chicago, Enid, Fort Worth, Galesburg, Kansas City, Oklahoma City, and Wichita. On August 4, 1998, the Carrier invoked the arbitration procedures of *New York Dock* to resolve their differences and achieve an implementing agreement for consolidation at the common points of the maintenance of way seniority districts of the BN and SF.[1] This decision covers only the consolidations at the eight common points still in dispute.

By letter of August 28, 1998, the parties selected the undersigned as a neutral referee. The parties exchanged prehearing submissions or briefs on October 27, 1998. A hearing was held on November 4 and 5, 1998, at the offices of the National Mediation Board in Washington, DC. On January 15, 1999, the BMWE submitted a posthearing document consisting of proposed rules of the STB and the Federal Railroad Administration and the BMWE's arguments concerning the applicability of those proposed rules to this case. The BNSF replied to the posthearing submission on January 21, 1999, and included a January 14, 1999, arbitration decision and implementing agreement involving the BMWE (and other unions) and three other railroads.

ISSUE

What are the appropriate terms for implementing agreements to consolidate BMWE seniority districts at the identified common points as a result of the ICC-approved merger of the BN and the SF?

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[1]The parties continued to negotiate while the arbitration procedure was being implemented, but they had not settled all of their differences beyond the Houston location.

POSITIONS OF THE PARTIES

With the exception of the Chicago terminal (which will be discussed in detail below), the BMWE does not dispute the Carrier's authority to consolidate the seniority districts at the points that are common to the BN and SF territories by establishing seniority zones that encompass parts of the seniority districts from both railroads. The parties have exchanged proposals and counter-proposals on the details of the consolidations. The BMWE proposals, in general, are more modest in scope than the BNSF's proposals. BMWE states that its proposals "are more appropriate for the limited consolidation of forces required by the Carrier to conduct operations within those common points" and less disruptive to the affected employees.

The proposals of the parties basically differ on the following points:

- The geographic boundaries of the consolidated seniority zones
- Who can bid on jobs in the consolidated zones
- Where the extra gangs (or mobile crews) may work in the zones
- Employees excluded from consolidation
- Which collective bargaining agreement(s) will apply
- The propriety of consolidating seniority districts at the Chicago terminal

In its merger application to the ICC, the Carrier indicated it would eliminate roughly 22 maintenance of way positions at these

common points. Those specific reductions do not appear to be an issue in this proceeding. Both parties agree that the *New York Dock* conditions will apply to all employees displaced or dismissed as a result of the consolidation.

Geographic Boundaries

Amarillo. The consolidated zone would include portions of BN Seniority District #26 and SF Central Region Seniority District #1, Zone 2. Both parties propose including the BN Seniority District from MP 328 to MP 340.1. Both would include the SF Seniority District from MP 3.5 to the north to MP 538.5 to the east. BNSF would extend the southern border to MP 572.0 on the SF line; the BMWE would end the zone at MP 558.0. BNSF asserts that its proposal for the southern border is the existing section limit for the crews that work out of the Santa Fe Amarillo Yard. BMWE argues that there is no operational justification for including this extra SF trackage, which is North Texas prairie and has no significant yards. BMWE claims this trackage is better maintained by SF divisional crews.

Enid. The parties agree on the boundaries of this zone: SF yard and track between MP 554 and MP 533 would be transferred to BN Seniority District #65.

Fort Worth. The consolidated zone would include portions of BN Seniority District #26 and SF Southern Region Seniority District #1, Zone 2. The parties agree that the district would extend from

Fort Worth north to MP 371 and south to MP 342.2 (on the SF territory), and west to MP 11 (on the BN territory). While the BMWE would not include any BN track east of Fort Worth, BNSF would include the BN track east to MP 643.9. The Carrier claims that this east track would still have to be serviced by Fort Worth-based personnel, because they are the nearest, or a new section crew would have to be created to service it, which would be inefficient. BMWE asserts that the disputed trackage, used by the former BN under a trackage rights arrangement, is owned by D/FW RAILTRAN, an administrative agency established by Fort Worth and Dallas to manage commuter rail service. RAILTRAN intends to expand passenger service and increase speed on those tracks, according to BMWE; and including employees who work on freight trackage into a freight/passenger mix creates potential safety concerns.

Galesburg. The parties agree that the consolidated zone will encompass MP 174 to MP 185 on the SF Eastern Region Seniority District #1 and the BN Seniority District #3 from the current northern, eastern, and southern boundaries to MP 171.

Kansas City. The consolidated zone would include portions of Seniority District #62 from the Frisco territory (a railroad previously merged with the BN), BN Seniority District #4, and SF Eastern Region Seniority District #2, Zones 1 and 4. Under both proposals, the northwest boundary would be MP 7.9 on the BN territory; the northeast limit would be MP 216.1 on the BN territory; and the eastern boundary would be MP 444.3 on the SF territory. The Frisco track and SF track run roughly parallel

south from Kansas City. Under BNSF's proposal, the Kansas City zone would include the Frisco track to MP 22 and the SF track to MP 27. The BMWE zone would be much smaller, including the Frisco track only to MP 2 and the SF track only to MP 8. The Carrier plans to build a new crossover at Olathe, where the Frisco and SF tracks practically meet at MP 22 (Frisco) and MP 27 (SF), so it wants to include this territory in the consolidated terminal zone. Moreover, according to BNSF, Olathe is included in the existing section limits of the former Frisco and SF. The BMWE maintains that its proposed consolidated zone includes all of the major and smaller yards identified by the Carrier in its ICC merger application.

Oklahoma City. The parties have no dispute on the boundaries of this consolidated zone: MP 535.8 to MP 554 from Frisco Seniority District #64, and MP 377 to MP 391 from SF Southern Region Seniority District #1, Zone 1.

Wichita.[4] The consolidated zone would transfer the Frisco Yard at Wichita and certain trackage to the SF Eastern Region Seniority District #2, Zone 2. Both proposals would limit the zone at MP 483.5 on the east. While the BMWE would end the zone on the west at the Wichita terminal (MP 501.1), the Carrier would extend the zone to MP 515.2, to include Valley Center. The Carrier argues

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[4]BMWE indicates that there is no dispute on the boundaries at Wichita (p. 28 of its submission). However, BMWE's proposal of August 4, 1998 (BMWE Exhibit 7) differs from the BNSF proposal of September 10, 1998 (BMWE Exhibit 10), and the Carrier's brief describes differences in the proposals.

that Valley Center is an industrial area; and although Valley Center is currently out of service, it is possible that some work would have to be performed there.

Bidding Rights and Authorized Work Areas for Headquartered Employees

Under both proposals, headquartered or fixed-point employees could work anywhere in their assigned zone, although BMWE adds that employees could only be *assigned* to positions from their respective seniority district rosters. Similarly, headquartered forces could work outside of the zone in their respective seniority districts, if permitted by their collective bargaining agreements. The BNSF and BMWE proposals differ on how vacancies would be bulletined or posted in the consolidated seniority districts.

In Amarillo, Fort Worth, and Oklahoma City, both proposals provide that the number of BN and SF employees already headquartered in the newly defined zone would be determined as of April 1, 1998. The BMWE proposal states that the ratio of BN and SF employees thus calculated would be maintained: Subsequent vacancies would be bulletined only to the appropriate seniority district roster; and if there were no bidders or furloughed employees available from that roster, the Carrier would have to hire new employees. The BNSF proposal states that the parties would mutually agree on the appropriate ratio of BN and SF headquartered employees (presumably, this would be the ratio calculated as of April 1, 1998), and prior bidding rights would be

granted for future vacancies. In other words, if vacancies occurred on the former SF territory in a consolidated zone, SF employees would have priority bidding rights; but if insufficient SF employees bid or were on furlough, other employees in the zone would be eligible for the positions and consolidated seniority throughout the zone would govern in filling the vacancies.

In Kansas City, three seniority districts are involved: BN, SF, and Frisco. The proposals for consolidation would work the same way as for Amarillo, Fort Worth, and Oklahoma City, but based on the relative percentages of the three different employee groups..

In Enid and Wichita, the consolidation would work somewhat differently. In Enid, both parties agree that the SF employees would be transferred to the applicable BN Seniority District; in Wichita, the former Frisco employees (BN employees working under the Frisco collective bargaining agreement) would be transferred to the applicable SF Seniority District. At both locations, employees thus transferred would have two options: (1) to dovetail their seniority into the new district, or (2) to decline the transfer and bump into a position in their old seniority district (presumably outside the consolidated zone). An employee bumped by option (2) would then have an option to (A) transfer to a position in the consolidated zone, or (B) exercise bumping rights within his own territory. Employees transferring to a new seniority district would get credit for their consolidated seniority (for their service on both territories) for vacation, leave, entry rates, and other seniority-based benefits. Moreover, an employee electing to

move to the new territory and accept dovetailed seniority (option 1) would have the right to return to his original seniority district at any time for two years. The only difference between the Carrier and the BMWE proposals for Enid and Wichita is that the BMWE proposes that options must be exercised within the time allotted to exercise seniority rights under their collective bargaining agreements, while the Carrier proposes a one-time, 60-day option. The BMWE asserts that the Carrier's proposal is potentially more disruptive because an affected SF employee in Enid, for example, might initially stay on the SF line, starting a chain of bumps, and then 60 days later elect to move to the BN, initiating another series of employee moves.

In Galesburg, the parties have agreed that BN and SF forces may work on the other's territory in the zone. However, BMWE would limit the time employees could work on the other territory to two days in any 30-day period, because BMWE believes that the Carrier's proposal could result in the replacement of all SF forces with BN employees. BNSF would not put a time limit on the cross-territory work.

Extra Gangs

As a general proposition, BNSF would allow all forces assigned to a zone—including mobile crews—to work anywhere within the zone. In addition, all forces—including mobile crews—would be permitted to work outside the zone in their seniority districts, if permitted

by the applicable collective bargaining agreement. Positions on the extra gangs that are expected to work exclusively within the zone would be allocated to the seniority rosters based on the "applicable percentage."[5] Vacancies would then be bulletined, with prior bidding rights granted to maintain the ratio. However, in the absence of bidders with prior rights, the jobs may be assigned from other forces within the zone. (The Carrier does not address extra gangs that are not expected to work exclusively within the zone.)

By contrast, the BMWE would allow extra gangs assigned to the zone to work anywhere within the zone but not outside the zone. Extra gangs from outside the consolidated zone would be permitted to work inside the zone only in their respective seniority districts and only if permitted by their collective bargaining agreements. BMWE would require that vacancies on the extra gangs be bulletined in all seniority districts in the zone, but assignments would have to maintain the set ratio of BN and SF (and, where appropriate, Frisco) headquartered employees determined on April 1, 1998. The Carrier would have to hire new employees for the gangs if there were insufficient bidders or furloughed employees from the appropriate seniority roster.

In Amarillo, the BMWE would not require that the extra gangs maintain the set ratio of BN and SF employees. Rather, extra gangs

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[5] "Applicable percentage" is not defined in the Carrier's proposals. BMWE understands that percentage to be the relative numbers of *all* positions in the consolidated zone on April 1, 1998.

would be bulletined in both seniority districts and assignments would be made on the basis of relative seniority in the applicable classification. However, the BMWE would limit the work of mobile crews on the other railroad's territory within the zone to five days within a 30-day period.

In Galesburg, the BMWE-proposed two-day limit in a 30-day period for working on the other railroad's territory presumably would apply to extra gangs assigned there.

Exclusions

BMWE would exclude Track Inspectors and Bridge and Building (B&B) employees from the consolidation agreements at Amarillo, Fort Worth, Kansas City, and Oklahoma City. (At Kansas City, Bridgetenders and Water Service employees also would be excluded.) B&B employees would be permitted to perform emergency work on the other railroad's property within the zone for no more than two days' duration. The BMWE explains that Track Inspectors already have assigned territories and are governed by federal regulations; and B&B forces in each area are already apportioned in a manner sufficient to carry out the day-to-day work.

The Carrier would not exclude any employees from the consolidation agreements.

Applicable Collective Bargaining Agreement

In its proposed shell agreement of June 29, 1998 (BMWE Exhibit

#6), the Carrier said that for each consolidated district, one collective bargaining agreement (CBA)—the dominant one in each of the nine zones—would apply.[6] Under the Carrier's proposal, the controlling CBA at the following five locations would be

Amarillo:	Santa Fe
Fort Worth:	Santa Fe
Galesburg:	Burlington Northern
Kansas City:	Santa Fe
Oklahoma City:	Frisco

At Enid, presumably the BN CBA would apply, as the parties have agreed that the SF yard and track would transfer to BN Seniority District #65. At Wichita, presumably the SF CBA would apply, as the parties have agreed to consolidate the Frisco yard and tracks into the SF Eastern Region Seniority District #2, Zone 2.

Under the BMWE proposal, headquartered employees would continue to work under their respective CBAs. The extra gangs assigned exclusively within the zone would be governed by the SF CBA at Amarillo, Fort Worth, Kansas City, and Oklahoma City. Extra gangs that work both inside and outside the zone would be governed by their existing CBAs.

The BMWE is especially concerned with the effect of assigning a single CBA to the headquartered forces in Oklahoma City and Enid. SF employees are covered by a 401(k) plan with a matching contribution from the company. Under the BNSF proposal, SF

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[6]The Carrier's final proposals in August and September 1998 were silent on the issue of the controlling CBA. I assume that BNSF maintains its position that one CBA should govern each zone.

Oklahoma City forces would work under the Frisco CBA,[1] and SF forces at Enid that elected to dovetail their seniority in order to hold their current jobs would work under the BN CBA. The BMWE asserts that a 401(k) plan is a retirement program, which is absolutely protected by *New York Dock*. BMWE urges the arbitrator to expressly provide that SF employees would retain all rights under their 401(k) plan, regardless of which CBA applies.

Chicago

The Carrier is proposing a consolidation of portions of the BN and SF seniority districts at the Chicago terminal. The BNSF proposal would combine MP 0.86 to MP 40.2 from BN Seniority District #1 and MP 3 to MP 10 from SF Eastern Region District #1. The proposal follows the Carrier's usual provisions:

- Based on the ratio of BN and SF employees in the consolidated zone as of April 1, 1998, seniority rosters would have prior bidding rights on vacancies.
- Extra gang positions would be assigned by prior rights.
- All forces in the zone—both headquartered and mobile—may work anywhere in the zone. They may also work outside of the zone on their respective seniority districts if permitted by their CBAs.
- The BN CBA would apply in the zone.

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[1] The BMWE notes that the Carrier apparently has withdrawn its proposal that the SF CBA would apply in Oklahoma City. However, the record contains no evidence that the proposal was withdrawn, and BMWE saw fit to raise the issue in its brief.

BMWE objects to this proposed consolidation at the Chicago terminal. By letter of October 8, 1998, BMWE told BNSF that "the Carrier's proposal needlessly compromises the safety of our members working in the Chicago area." The BMWE argues that the arbitrator is precluded from implementing the Carrier's proposal on safety grounds.

The BN trackage is 40 miles long and involves both freight and high-speed passenger service on quadruple and triple track, 60 high-speed crossovers, and 15 curves. As many as 180 trains operate on this track daily. The SF track proposed for consolidation is seven miles long, a straight-forward double track, and involves only freight movement. BMWE argues that using SF employees on the BN trackage at the Chicago terminal under working conditions they are unfamiliar with would put the employees at extreme risk.

BMWE contends that the perils inherent in this proposed consolidation mean that the consolidation is not an "approved" transaction. BMWE cites a 1992 arbitration award (under Article XII of the Imposed Agreement) by John Fletcher involving the Chicago and North Western Transportation Company (CNW) and the BMWE. In that case, the CNW had argued *for* separating commuter and freight lines into separate territories, and Fletcher agreed, stating,

> Safety of employees and the public is a significant factor which cannot and had ought not be attempted to be quantified monetarily. Setting off the freight territories from the suburban commuter territories, where different

> skills and experience are necessary, and where continuity of the work force is of substantial benefit, is an operational need of sizable magnitude.

BMWE also sites a provision of section 10101(11) of the Staggers Rail Act of 1980 (the Rail Transportation Policy): "It is the policy of the United States Government . . . to encourage fair wages and safe and suitable working conditions in the railroad industry." Consequently, the BMWE argues, the STB may not approve an unsafe transaction, and the arbitrator in a *New York Dock* proceeding is a delegate of the STB. Moreover, section 11326(a) of the Interstate Commerce Commission Termination Act[8] demands that employees affected by an approved merger "will not be in a worse position related to their employment" as a result of the transaction.

A *New York Dock* arbitrator is "without authority to impose safety conditions as part of any implementing agreement," according to the BMWE. Therefore, the BMWE maintains, the Carrier's proposed consolidation at the Chicago terminal is not an "approved" transaction because of the inherent safety problems; the arbitrator cannot remedy the safety problems; and, therefore, the arbitrator may not fashion an implementing agreement for the Chicago terminal.

The Carrier disputes that its proposed consolidation creates a safety problem. According to the Carrier, the same skills and abilities are required to maintain freight track and passenger

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[8]The successor provision to section 11347 of the Interstate Commerce Act.

track. Compliance with work rules will assure the safety of personnel. To the extent experience contributes to safety, the Carrier points out that its proposal would give prior bidding rights to experienced BN forces for assignments on the BN track; and SF employees who might be assigned there would bring more relevant experience to the job than the new hires that would result if consolidation were denied.

Proposed FRA and STB Rules

On December 24, 1998, the Federal Railroad Administration (FRA) and STB served a notice of proposed rulemaking for the development and implementation of safety integrated plans (SIPs) by railroads proposing to merge, consolidate, or acquire other railroads. The proposed rules would require carriers to submit a written SIP to both the FRA and the STB before a merger or acquisition transaction could be approved. In the introduction to the proposed rules, the FRA and STB note two recent safety concerns that prompted the SIP proposal: (1) the consolidation of seniority districts following the merger of the Union Pacific and Southern Pacific railroads, resulting in the retirement of experienced personnel and the use of forces who lacked training on the new territory's operating rules; and (2) equipment failures and lack of coordination in dispatching systems following the BN-SF merger.

The BMWE submitted a copy of these proposed federal regulations to support its contention that the arbitrator has jurisdiction to consider the safety implications of the Carrier's

proposed Chicago consolidation. The BMWE maintains that this joint FRA/STB document supports the following two conclusions:

- The STB must consider railroad safety in all matters before it, and a *New York Dock* arbitrator, acting as an agent of the STB, must consider safety.
- The FRA specifically identified the use of roadway workers in unfamiliar territory as a safety problem.

The Carrier responded by noting that the document serves notice of *proposed* rules, with prospective effect at some future point only. The BNSF also emphasizes that the proposed regulations purport to combine the expertise of the FRA—in all railroad safety matters—and the expertise of the STB—in economic regulation and environmental impacts. Therefore, the Carrier says, the FRA—not the STB—has primary responsibility for railroad safety. The BNSF concludes that the BMWE's argument is a Catch-22: It urges that a *New York Dock* arbitrator must consider safety and, at the same time, is precluded from imposing safety conditions in an implementing agreement.

DISCUSSION

During World War I, the railroads in this country were nationalized. After the war, the Transportation Act of 1920 returned the railroads to private ownership, and the federal government adopted a policy of encouraging consolidations and mergers of the railroads. As a matter of policy, the ICC in 1938

began requiring certain protections for railroad employees who were affected by the consolidations and mergers. The Transportation Act of 1940 reiterated the federal policy of encouraging voluntary mergers and consolidations of railroads, provided such transactions served the public interest, and legally mandated labor protective conditions that the ICC had been imposing as policy.

Over the next 40 years, the types and levels of labor protections the ICC ordered when approving transactions evolved. In 1979, the ICC issued a set of labor protective conditions in its *New York Dock* decision. This set of conditions became the standard for the minimum protections that would be required. The *New York Dock* conditions imposed both financial benefits and procedural requirements to protect affected employees.

Article I, section 2 of the *New York Dock* conditions spawned a lot of litigation. That section provides

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

This section seemed to contradict the provisions of Article I, section 4 of *New York Dock*, which clearly contemplated that changes would occur, required the railroad to notify employees and their representatives in advance of an anticipated transaction, mandated that the railroad and employees negotiate those changes, and

required arbitration if the parties failed to reach agreement on those changes. In fact, arbitrators had been imposing changes such as transfers of employees and work and minor modifications of rules and working conditions regularly over the past 40 years.

To resolve this apparent contradiction, the ICC explained in its *Carmen I* decision[9] (1988) that a carrier is permitted to override CBA provisions that would impede the full implementation of an ICC-approved transaction, upon compliance with the imposed labor protections. In *Carmen II* (1990), the ICC further explained that CBAs should be preserved, but that limited modifications to CBAs could be made if necessary to complete an approved merger or consolidation. *Carmen II* said that the bargaining rights of employees must be balanced by the business needs of railroads. In *Carmen III* (1998), the STB clarified once again the authority and limitations of a *New York Dock* arbitrator to modify CBA provisions.

Carmen III specified the following limitations on arbitrators' authority to modify CBAs:

Approved transaction. There must be an approved transaction. If the principal transaction (generally a consolidation or acquisition of control) is approved directly by the ICC or STB, the subsequent transactions that occur as a direct result (e.g.,

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[9]The series of Carmen decisions are ICC and STB decisions resulting from *the CSX Corp.—Control—Chessie and Seaboard Coast Line Industries, Inc.* consolidation and the subsequent appeals for review of arbitral decisions involving the Brotherhood of Railway Carmen.

consolidation of facilities and transfer of work assignments) and that are necessary to fulfill the purpose of the principal transaction are also approved.

Necessity. Arbitrators may override CBA provisions only when necessary—not merely convenient—to effect an approved transaction and realize a transportation benefit such as enhanced efficiency or greater safety. "Arbitrators should not require the carrier to bear a heavy burden" to justify operational changes to enhance efficiency, but arbitrators also should not assume that all labor arrangements should be modified.

Rights, privileges, and benefits. Benefits such as group life insurance, hospitalization and medical care, free transportation, sick leave, disability and retirement programs, workers' compensation, and unemployment compensation may not be altered by arbitrators. These are the "rights, privileges, and benefits" referred to in Article I, section 2 of *the New York Dock* conditions, and they are protected absolutely. Other employee interests (e.g., scope rules, seniority provisions, union representation arrangements, rates of pay, work rules, and working conditions) may be altered by an arbitrator if a two-part test of necessity is met:

1. Is there a nexus between the changes sought and an approved transaction?

2. Is modification of the CBA necessary to achieve a transportation benefit to the public from the transaction?

If the answer to both question is yes, modifications to the CBA involving *other than section-2-protected benefits* are deemed necessary and permitted.

Approved Transaction

The merger of the BN and the SF was approved by the ICC in 1995. The consolidations of seniority districts at the eight common points clearly flow as a direct result of the approved principal transaction. With the exception of Chicago, the parties agree that these consolidations are also approved transactions.

The BMWE maintains that the proposed transaction at Chicago is not an "approved" transaction because it compromises the safety of its members. The proposed FRA-STB rules, which would require that a railroad adopt a safety integrated plan (SIP) before a merger application could be approved, supports its contention, the BMWE claims.

The SIP proposal is just that—a proposal. If and when adopted, it will have prospective effect only. While these proposed rules demonstrate the government's concern with railroad safety, they have no timely applicability to the issues before me. Moreover, the proposal places responsibility for considering safety issues on the federal government, and most especially the FRA. There is no suggestion that a *New York Dock* arbitrator has the expertise to decide safety issues. The BMWE even asserts that a *New York Dock* arbitrator is precluded from imposing safety

conditions.

According to *Carmen III*, the only criteria for finding that a subsequent transaction is approved is that it occurs as a direct result of an approved principal transaction and it is necessary to fulfill the purpose of the principal transaction. Those criteria are met in the proposed Chicago consolidation, as they are at the other seven common points.[10]

Necessity

Whether the proposed CBA modifications are necessary to effect the approved transactions will be addressed individually for each of the common points.

Rights, Privileges, and Benefits

The SF employees are covered by a 401(k) plan, which is a retirement income program. The BMWE correctly points out that the 401(k) plan is a benefit that is absolutely protected by Article I, section 2 of the *New York Dock* conditions. As a result, the SF employees will maintain all rights to their 401(k) plan, whatever other CBA modifications may be made, unless and until the parties agree to change the plan through RLA section 6 bargaining.

The other changes sought by the Carrier represent CBA

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[10]I note, for the record, that I am not persuaded that the proposed Chicago transaction is unsafe. The Carrier correctly points out that occasionally using SF employees on the unfamiliar BN tracks would present a smaller safety risk than hiring inexperienced, new employees to work the BN track.

modifications that may be changed by an arbitrator if they meet the two-part test of necessity.

Individual Proposals

Geographic Boundaries

In every case where the parties have not agreed on the boundaries of the consolidated seniority zones, the BNSF proposal is for a larger territory than the BMWE proposal. The reason for consolidating seniority districts is to promote efficiency and productivity, which is one of the underlying purposes of the federal policy advocating railroad mergers. It follows logically that a larger zone that consolidates two (or more) groups of employees working separately but in reasonably close proximity would be more efficient than a smaller one, absent some extraordinary factors. As a general rule, the larger consolidated zone will achieve a greater public transportation benefit by allowing the Carrier to operate even more efficiently.

Amarillo. The BMWE has presented no argument to contradict the assumption that the larger zone would be more efficient. Therefore, the parties shall adopt the Carrier's proposed zone.

Chicago. The BMWE has offered no counterproposal to the BNSF's proposed consolidation, relying solely on its argument that any consolidation in Chicago should not be condoned. Since I have dismissed the BMWE's objection to the Chicago consolidation, the Carrier's proposed boundaries shall be adopted by the parties.

Enid. The parties have agreed to transfer the SF yard and track between MP 554 and MP 533 to the BN Seniority District #65. It is so ordered.

Fort Worth. The BMWE asserts that including the BN track east of Forth Worth to MP 643.9 presents safety issues because of the presence of passenger trains. I am not persuaded by this assertion, for the same reasons discussed above relative to the Chicago consolidation. Therefore, the parties shall adopt the Carrier's proposed zone.

Galesburg. The parties have agreed that the consolidated zone will encompass MP 174 to MP 185 from the SF district, and the BN Seniority District #3 from the current northern, eastern, and southern boundaries to MP 171. It is so ordered.

Kansas City. The disputed area is the parallel Frisco and SF tracks south of Kansas City. The Carrier presents a logical reason for its proposal: the inclusion of a new crossover at Olathe that it plans to build that will allow trains to bypass the Argentine Yard if desired. The BMWE says only that its smaller proposed zone includes all of the yards identified by the Carrier in its merger application. On its face, the Carrier's proposal makes more sense and should provide the greater transportation benefit. Therefore, the parties shall adopt the Carrier's proposed zone.

Oklahoma City. The parties have agreed on the boundaries of this consolidated zone: MP 535.8 to MP 554 from the Frisco track and MP 377 to MP 391 from the SF track. It is so ordered.

Wichita. The Carrier's proposal would include Valley Center at MP 515.2 on the Frisco line. The BMWE has offered no specific objection to this proposal, so I must assume that the Carrier's proposal will be efficient and should be adopted. Therefore, the parties shall adopt the Carrier's proposed zone.

Bidding Rights

Both parties begin by determining the percentage of existing headquartered positions for each CBA seniority roster as of April 1, 1998, in each consolidated zone where applicable.[11] From that point, the proposals diverge. The BMWE would maintain the ratios indefinitely: Subsequent vacancies would have to be filled from the appropriate rosters in the appropriate percentages (and new employees hired if there are insufficient bidders). The BNSF would grant prior bidding rights based on the calculated ratio; however, if unable to fill positions from the appropriate roster, the Carrier would have the right to assign personnel from the other roster(s).

The Carrier's proposal is significantly more efficient and appropriate. The Carrier should have the flexibility to assign available employees, especially furloughed employees, from the other roster(s). This flexibility should allow the Carrier to

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[11]This procedure would not apply in Enid or Wichita, where all employees would transfer to a single seniority district. It is not clear if it would apply in Galesburg, where the parties have simply agreed that BN and SF forces could work on each other's territories.

maintain its operations more efficiently, and potentially could save the Carrier the cost of benefits for furloughed employees. By granting prior bidding rights, the Carrier's proposal prevents displacement of incumbent employees and minimizes the impact on CBA provisions. Therefore, the parties shall adopt the Carrier's proposal granting prior bidding rights in Amarillo, Chicago, Fort Worth, Kansas City, Oklahoma City, and, if appropriate, Galesburg.

Bumping Rights

In Enid and Wichita, all positions in the consolidated zone would transfer to a single seniority district. The parties have agreed conceptually to a process allowing employees to choose to (1) accept the transfer (and dovetail their seniority in the new seniority roster), or (2) remain in their current seniority district by exercising seniority rights and bumping into another position in their seniority district that is outside the consolidated zone. The Carrier would give affected employees a one-time option and 60 days in which to exercise that option. The BMWE would invoke the existing CBA provisions to limit the time employees would have to make the choice.

The Carrier has presented no persuasive argument for disturbing the existing CBA time limits in this matter. If the current contracts would potentially allow multiple choices by each affected employee, however, the resulting chaos would hamper

efficient operations.[11] Therefore, the implementing agreements at these two locations shall provide a one-time right for employees directly affected by the consolidation to bump back into their former seniority district, and they shall have the time period specified in their current CBA to make that choice. Likewise, any employee bumped as a result of an employee returning to his former seniority district shall have a one-time right to transfer to the consolidated zone or exercise his bumping rights, subject to the time limits in his CBA.

Authorized Work Areas for Headquartered Employees

In general, both parties agree that headquartered employees could work anywhere in their assigned zone, and they could also work on their respective seniority districts outside the zone if permitted by their CBAs. However, in Galesburg, the BMWE would limit the amount of time an SF employee could "cross over" to work on the BN territory or a BN employee could "cross over" to work on the SF territory to two days in any 30-day period. The BMWE would further require that the section gangs assigned to the territory be working at the same time that the crossover work is authorized.

The BMWE explains that the reason for the time limit in Galesburg is its fear that the BNSF could manipulate the assignments to replace all SF forces with BN employees because the

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[11]The CBAs involved are not included in the record, so I do not know the time limits involved or if they would permit employees to make multiple choices regarding bumping.

SF operations in the area are considerably less than the BN.

Inherent in any consolidation is the possibility—perhaps even likelihood—that some employees will be dismissed as operations are made more efficient. If the Carrier finds it can maintain the limited SF tracks in the zone with its existing BN employees in the zone, that would further the purposes of consolidation and the gain of a public transportation benefit. And the employees dismissed as a result of that consolidation would be entitled to the *New York Dock* financial benefits. The intention of the labor protective conditions of *New York Dock* and its predecessors is to provide compensation to affected employees, not to guarantee jobs to them.

Therefore, the Carrier's Galesburg proposal with no restrictions on the amount of crossover work shall be adopted.

Extra Gangs

There are two major areas of disagreement between the parties with respect to extra gangs: where they could work and how the positions would be filled.

Under both proposals, extra gangs could work anywhere in their assigned zones. (In Amarillo and Galesburg, discussed below, BMWE would limit the amount of time the extra gangs could work on the other railroad's property.) However, while the BNSF would permit extra gangs to travel outside the zone to work on their seniority district, if allowed by the CBA, the BMWE would prohibit extra gangs from working outside their assigned zone. Once again, the

efficiency inherent in the Carrier's proposal must be encouraged. Moreover, the Carrier's proposal seems to create less disturbance to existing contract provisions. To the extent the employees' CBAs allow work outside of the zone, that must be permitted in the implementing agreements. Likewise, extra gangs assigned outside the zone must be allowed to work on their seniority districts inside the zone, if permitted by their CBAs. The Carrier's proposal on this issue shall be adopted.

In Amarillo and Galesburg, the BMWE's limitations on work by mobile crews on the other railroad's territory within the zone are not justified. As I understand the BMWE's proposal, mobile crews in Amarillo would be restricted to working on the other railroad's territory within the zone to a maximum of five days within a 30-day period; and in Galesburg, all employees—including extra gangs—would be limited to working two days within a 30-day period on the other territory. For the reasons discussed above on the BMWE's proposed restriction on crossover work for headquartered Galesburg employees, the BMWE's proposals in Amarillo and Galesburg must accede to the Carrier's need to promote efficiency and productivity.

As for filling vacant positions on the extra gangs, the parties' proposals mirror their proposals for headquartered forces. They would compute a ratio of employee groups in each zone as of April 1, 1998. The BMWE would require the Carrier to maintain that ratio indefinitely; the BNSF would attempt to maintain that ratio by granting prior bidding rights, but would be able to fill

vacancies from other employee groups when necessary. The Carrier's proposal shall be adopted in Amarillo, Chicago, Galesburg, Fort Worth, Kansas City, and Oklahoma City, for the reasons explained above under general bidding rights.[1]

Exclusions

The BMWE has presented no persuasive arguments for excluding certain employees from the consolidation agreements or for limiting the amount of time B&B forces could perform "emergency work" on another railroad's property within the zone. The BMWE has made assertions that allegedly distinguish Track Inspectors, B&B employees, Bridgetenders, and Water Service employees from other BMWE forces, but the distinctions have no bearing on consolidation. Track Inspectors, for example, would still be governed by the same federal regulations after consolidation. The arguments that favor consolidation for other BMWE personnel apply equally to the groups the BMWE would exclude. The arguments against time limits on crossover work apply equally to B&B forces. Therefore, the BMWE's proposed exclusions shall not be part of the implementing agreements.

Applicable Collective Bargaining Agreement

Under the standards established in *Carmen III*, an arbitrator

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[1]In Enid and Wichita, all employees would transfer to a single seniority district, so the bidding rights of extra gangs assigned to the zone should not be an issue.

may modify CBA provisions only when necessary to achieve a transportation benefit. The Carrier has failed to demonstrate how it is necessary that all headquartered employees in the consolidated zones must work under a single CBA. That proposal falls squarely under the category of "convenient, but not necessary." Therefore, the BMWE's proposal that all headquartered employees in Amarillo, Chicago, Fort Worth, Galesburg, Kansas City, and Oklahoma City would continue to work under their respective CBAs shall be adopted. Employees at Enid shall work under the BN CBA, and employees at Wichita shall work under the SF CBA.

This arrangement has the added advantage of assuring the rights of all SF headquartered employees to continue participation in their 401(k) plan.

As for the extra gangs, the parties apparently agree that a single CBA must apply to the gangs assigned exclusively within each zone. There is agreement that the SF CBA would control in Amarillo, Fort Worth, and Kansas City; it is so ordered. The BMWE Galesburg proposal is silent about the controlling CBA; therefore, if there are any extra gangs in Galesburg, they shall be governed by the BN CBA, as proposed by the Carrier. The BN CBA shall also govern the extra gangs in Chicago. In Oklahoma City, the Frisco CBA shall apply, because (according to the Carrier), that is the dominant CBA in the consolidated zone. Extra gangs at Enid shall work under the BN CBA, and extra gangs at Wichita shall work under the SF CBA.

Note that any SF employees assigned to work on extra gangs

under a CBA other than the SF CBA must, nonetheless, be allowed to continue under the SF 401(k) plan.

There is certain confusion in my records as to possible agreements by the parties concerning MP limitations. Nothing herein should be construed as an attempt to alter any of the agreements previously reached by the parties.

DECISION

> The parties shall adopt implementing agreements at the common points of Amarillo, Chicago, Enid, Fort Worth, Galesburg, Kansas City, Oklahoma City, and Wichita as described above. If the parties have not executed agreements for all locations within 60 days after the effective date of this decision, they may contact this arbitrator, and I will write an implementing agreement for any location for which an agreement has not yet been executed.

Signed this 25th day of March 1999 in Bethesda, Maryland.

Joseph M. Sickles
Arbitrator

ATDA EXHIBIT F

IN THE MATTER OF ARBITRATION

Parties to Dispute

Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company	)	New York Dock Article I (4) ICC Fin. Docket 32000
vs	)	
Brotherhood of Locomotive Engineers - ATDD Division	)	

Before

Edward L. Suntrup, Arbitrator

Appearances

For the Company

Wayne M. Bolio	-	Assistant General Counsel, SP
William E. Loomis	-	Dir. of Labor Relations, SP
Ray M. Winkenbach	-	Sen. Manager of Labor Relations, SP
Bruce Feld	-	Sen. Manager of Labor Relations, SP

For the Union

Michael S. Wolly	-	Zwerdling, Paul, Leibig, Kahn, Thompson & Driesen, Counsel for BLE-ATDD
Dean Bennett	-	Vice President, BLE-ATDD
Richard W. Ford	-	General Chairman, BLE-ATDD, SP-W
David W. Volz	-	General Chairman, BLE-ATDD, SP-E

Background

On December 3, 1993 the company issued a Notice in accordance with Section I (4.)(a) of the New York Dock Protective Conditions. That Notice read as follows.

> This will constitute the required 90-day written notice served pursuant to New York Dock conditions, Section I (4)(a) as imposed by the ICC Finance Docket 32000, of the intent of Southern Pacific Transportation Company (Western and Eastern Lines), Denver Rio Grande and

Western Railroad Company and St. Louis Southwestern Railway Company to consolidate train dispatching functions in Denver, Colorado. The purpose and effect of the transaction is to coordinate all dispatching functions in a single location to provide, in conjunction with the Transportation Services Center and the consolidated Customer Services Department, integrated and efficient train dispatching functions for the Carrier's rail lines. This work will then be performed in Denver, Colorado under the Agreement between the D&RGW and the Dispatchers' Steering Committee, and the rules and terms and conditions of employment applicable in Denver on the D&RGW.

It is anticipated the dispatcher positions in Roseville and Houston will be consolidated in Denver as result of this transaction, and that employees will be transferred to Denver. Effective upon completion of the transaction, it is anticipated that all dispatcher positions in Houston and Roseville will be eliminated. Should an employee be adversely affected as a result of this transaction, the conditions for the protection of employees enunciated in New York Dock Railway - Control Brooklyn Eastern District: 360 ICC 60 (1979), designated as New York Dock conditions, will be applicable.

Therefore, this 90-day written notice is hereby given pursuant to ICC Finance Docket 32000, New York Dock conditions, Section 4(a), which provides 'such railroad contemplating a transaction which is subject to these conditions and may cause the dismissal, displacement of any employee, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction' for the benefit of the employees who may be affected.

That Notice was issued in accordance with provisions of New York Dock Conditions which are cited here for the record, in pertinent part.

Article I (4.) Notice and Agreement or Decision

(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending

registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

> (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.
>
> (2) No later than twenty (20) days after a referee has been designated hearing on the dispute shall commence.
>
> (3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days form the commencement of the hearing of the dispute.
>
> .....

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

On December 3, 1993 company's management also met with the

President, one of the Vice Presidents, and other officials of the BLE-ATDD. In that meeting company's management verbally notified those officials of the intended consolidation of dispatcher work to Denver. One of the company's Labor Relations' Directors also wrote, on that date, to the BLE-ATDD's General Chairmen located in Texas and California, in accordance with provisions of Article 1 (4) of New York Dock as cited above, that the Roseville and Houston dispatching facilities would be shut down and the work transferred to Denver.[1] On December 4, 1993 the company posted an Employee Bulletin explaining, among other things, that "...it is anticipated that these relocations (related to the transaction) would take place during the summer of 1994."

Negotiation Impasse & Arbitration Option

The parties conducted negotiations in accordance with the provisions of Article 1 (4.) of New York Dock and were unable to arrive at an implementing agreement within the time-lines stated therein. Accordingly, they opted for arbitration. The instant arbitrator was chosen by the parties to hold a hearing, gather evidence, and issue an Award. The date of the hearing was set for March 25, 1994. Locale which was acceptable to all parties concerned was the premises of the company's offices located in San Francisco, California.

Pre-Hearing Arbitral Rulings

Prior to the arbitration hearing, counsel for the union

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[1]One of these Chairmen had, in fact, been at the December 3, 1993 meeting with company's management when the proposed coordination was orally discussed.

requested that the arbitrator rule on a number of issues in order that the union could "...prepare for the upcoming arbitration...". After the arbitrator requested clarification, by counsel, of the issues at bar, and after permitting the company to also present its point of view on this request to produce, the arbitrator ruled on the matters in question on March 12, 1994.

The arbitrator rejected the union's request that the company produce economic facts which may have served as basis for the company's having undertaken the consolidation in the first place. The rationale for this ruling was that Article 1 (4.) of New York Dock does not provide an arbitrator with the authority to second-guess management's decisions with respect to coordinations and transactions. Since such was so, there was no need to introduce economic facts of the type requested, into the record.

The union also raised the issue of the pertinent union contract which would cover the dispatchers at Denver, Colorado after the coordination and asked the arbitrator to rule on this matter. The union raised this issue for the obvious reason that it had been addressed by the company's original December 3, 1993 Section I (4.) Coordination Notice to the BLE-ATDD, and elaborated on by the company on that same date when it sent out a concurrent memo to all pertinent employees working in the Roseville,

California and Houston, Texas train dispatching centers.[2] Although the arbitrator had no information on this at the time of the pre-hearing rulings, both sides had also included labor agreement coverage as a tentative provision in their implementing agreement proposals and counter-proposals to each other during negotiations prior to going to arbitration.[3] The arbitrator issued a preliminary ruling on this matter prior to the hearing. In that ruling he stated that it was his view that he had no authority under Article 1 (4.) to resolve the issue of which collective bargaining agreement would be the proper one dispatchers at the Denver consolidated dispatching center. During and after the hearing the BLE-ATDD requested that the arbitrator reconsider this ruling. In view of the importance of this issue it will be addressed again in this Award by the arbitrator, not only in the light of the pertinence, if any, of a subsequent NMB ruling on representation of dispatchers on the SPL, but also because the arbitrator now has a full record before him which was not the case when the pre-hearing ruling was made.

The arbitrator then issued preliminary rulings on other pre-

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[2]Union Ex. H, @ p. 2. The company was very explicit on this issue in that memo. The language it used is cited here for the record.

> "Upon transfer to Denver, employees (i.e. Dispatchers) will no longer be represented by the ATDA union but will be represented by the Dispatchers Steering Committee which won an election conducted by the (NMB) replacing ATDA on 8/20/85...". (In July of 1993 the ATDA merged with the BLE & is referred to here in the record more correctly as BLE-ATDD).

[3]See Union Ex. I & J; Carrier Post-Hearing Exs. 5, 7 seq.

hearing matters raised by the parties with respect, for all practical purposes, to the arbitrability of issues subject to this forum under York Dock Conditions @ Article I (4.). Given information available at that time, however, the arbitrator added the proviso that he could not "...properly rule on these matters in toto until the arbitration hearing itself..." had been held and he had a full record before him.

The Jurisdictional Issue[4]

At the hearing, which took place as scheduled, counsel for the BLE-ATDD raised a threshold issue which neither the arbitrator nor the company had been apprised of prior to that time. That issue dealt with whether an arbitration hearing on an implementing agreement at Denver for the dispatchers should proceed under provisions of New York Dock @ Article I (4.) or whether, since a March 21, 1994 ruling by the NMB,[5] protections for dispatchers at Denver might not more properly be negotiated under the June, 1966 Agreement. The latter had originally been negotiated between the old ATDA, and the SPT and the D&RGW, respectively, when the latter

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[4]The jurisdictional question here deals with the proper provisions under which this arbitration forum should proceed. Such, of course, cannot be confused with the jurisdictional issue of which collective bargaining contract should properly cover the Denver Dispatchers after the coordination.

[5]That NMB ruling is discussed in the separate Award on the jurisdiction question raised by the BLE-ATDD and details related thereto need not be reiterated here. That ruling will be addressed later in this Award, however, when the arbitrator deals with labor contract(s) covering the Denver dispatchers after the coordination. The NMB ruling is found in: National Mediation Board, 21 NMB No. 44. NMB Case No. R-6165 & NMB Case No. R-6273 (NMB File No. C-6356) issued March 21, 1994. That ruling also deals with a Yardmasters/ TCU issue which is not pertinent to the instant case.

were both autonomous railroads as well as members of the National Railway Labor Conference (NLRC). The arbitrator issued a bench decision on this matter at the hearing. He ruled that the June, 1966 Agreement was not applicable to this proceeding. Further, in response to a request by counsel for the BLE-ATDD, the arbitrator has subsequently issued a written opinion on this same issue. That opinion is found in a separate Award, issued on the same date as the instant Award, which deals specifically with this particular jurisdictional question raised by the BLE-ATDD at the March 25, 1994 hearing. In that separate Award the arbitrator reaches the same conclusion that he did in his bench decision which was issued at the hearing.

What Collective Bargaining Agreement Should Cover the Dispatchers at the New Dispatching Center at Denver, Colorado After the Coordination; Is this Issue Properly Before This Board?

Beginning with the Notice by the SPL to the BLE-ATDD in December of 1993, through the negotiations by the parties in an attempt to come up with an implementing agreement for the Dispatchers in Denver per the coordination, up to and including this arbitration, a persistently thorny issue has remained which is endemic to the facts of this case and which is not uncommon to Dock Article 1 (4.) arbitrations. And that issue is: what collective bargaining contract should cover the SPL Dispatchers in Denver as the coordination there proceeds at the new dispatching center?

Position of the Parties

At the time of issuance of the Notice by the SPL under New York Dock @ Article 1 (4.), the company's position on this matter

was clear. The coordinated Dispatchers off the SP-W and SP-E would be covered by the labor contract which the D&RGW has had with the DSC since 1985. The DSC had been certified by the NMB on August 20, 1985.[6] Effective September 1, 1985 a document was drawn up by the Chief Transportation Officer of the D&RGW which dealt with the following issues: employees covered, bulletining of positions, vacations, sick leave allowance, salary, benefits coverage, and discipline.[7] In its negotiations with the BLE-ATDD over an implementing agreement the SPL had consistently held that the DSC-D&RGW labor agreement should be the binding one on all Dispatchers at the consolidated train dispatching center in Denver. The language suggested by the SPL in implementing agreement negotiations with the BLE-ATDD on this issue is unambiguous. That language, stated here for the record, is the following:

> "The current rules and working conditions applicable to train dispatchers represented by the Dispatchers Steering Committee in Denver, Colorado shall be the applicable collective bargaining agreement in the consolidated train

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[6] National Mediation Board (12 NMB No. 102, Case No. r-5537).

[7] See Carrier Post Hearing Ex. 4. Counsel for the BLE-ATDD has consistently criticized the status of this document as a labor contract. Apparently on grounds that the document does not have the signatures of the labor organization and the management representatives which is common procedure in most collective bargaining forums. The arbitrator is neither disposed, nor does he believe it is his role, in this case, to deal with such issue. The DSC has never stated that the document is not a contract, and the SPL has consistently stated that it is one. The arbitrator has no choice, nor any authority, to do other than accept this at face value.

dispatching center in Denver, Colorado."[8]

The SPL has never stated that the BLE-ATDD labor contracts currently in existence at SP-W and SP-E would go out of existence. Rather, it has argued that it did not propose any "...changes to existing agreements...". Evidently, the factual consequence of such position is that the BLE-ATDD Agreements on the SP-W and SP-E, while continuing to exist, would have no dispatchers to cover. The dispatching operations at Roseville and Houston were to be closed.[9] While arguing that it did not wish to make any change in existing agreements, the SPL has also argued, concurrently, that existing agreements are not portable under a New York Dock Article 1 (4.) Notice. In so doing it cites inter alia, the 1987 N&W, Southern v. ATDA (herein called: "SOC"), and the 1988 Southern Railway, Illinois Central Railroad v UTU (herein called: "Hayleyville") cases and accompanying New York Dock Article 1 (4.) arbitration Awards.[10] In those Awards, the arbitrator ruled that when employees are coordinated off one railroad to another the collective bargaining agreement left behind does not travel with those being transferred. In the 1987 "SOC" case the ATDA,

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[8]This language is taken from the SPL's proposal to the BLE-ATDD on February 8, 1994 which was the last formal bargaining session between the parties. See inter alia, company Pre-Hearing Ex. 7 @ p. 1 (Section 1: (b)).

[9]To the extent that such language makes sense, they would be "empty" agreements, or existent agreements with no employees to cover.

[10] The former Award, referred to sometimes as the "SOC" or System Operations Center case, and the latter, referred to sometimes as the "Hayleyville Case" (Arbitrator: R. Harris) are found in Carrier Pre-Hearing Appendices 8 & 10.

predecessor to the BLE-ATDD in the instant case, argued that the N&W contract should travel with it to Atlanta on the Southern property where employees performing power distribution were non-represented. The arbitrator rejected such argument on a number of grounds, including the one which stated that New York Dock Protections "...(go) to individual employees, not to their collective bargaining representatives..." The arbitrator also noted that to permit the transfer of the N&W agreement to Atlanta would have involved the resolution of a representation issue, in that case, which is reserved only to the NMB.[11] In the "Hayleyville" case, the United Transportation Union (UTU) argued unsuccessfully before the same arbitrator that when employees were coordinated off the ICC to the Southern property the UTU-ICC agreement should have been portable. The UTU argued, in that case, on basis of provisions found in Article 1 (2.) of New York Dock. These were rejected by the arbitrator too. The latter based his conclusions on the 1985 ICC Maine Central Railroad case (Finance Docket No. 30532). Although, the arbitrator concludes, in "Hayleville", that Maine Central "...did not state specifically that the inconsistencies between Article I, Sections (2.) and (4.) of New York Dock Conditions are to be resolved in favor of Section (4.), that conclusion is inescapable."[12]

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[11] The arbitrator states, in that Award, that "The NMB has exclusive jurisdiction over representation matters." Appendix 8, @ 15. Of interest here, since that issue is raised, is that the NMB has already done its duty in Denver with respect to that question on the SPL in its March 21, 1994 ruling.

[12] "Halyeville" @ pp. 12-13 (Carrier Appendix 11).

In short, the SPL argues that the arbitrator has no authority to rule that the BLE-ATDD agreement off the SP-E and SP-W are portable to Denver. In its Reply Submission the company reiterates what it had argued more extensively in its earlier Submission and Brief to the arbitrator which is that: "...it does not view the Article 1 (4.) process as addressing broader issues of collective bargaining....". What should the instant forum limit itself to? The SPL states that it should be the following:

> "The task before this Board is merely to provide an implementing agreement that allows the Dispatching Center to become operational with as little disruption and inefficiency as possible, and with a means to achieving the positive benefits in such an operation."

Lastly, the SPL argues that it would be improper to apply NLRA successorship doctrine to this case since there is no precedent, coming either from the courts, or the ICC, to apply such doctrine to the RLA.[13]

In its final proposal before this arbitration forum on an implementing agreement for the Denver dispatchers the company states the following about a Denver collective bargaining agreement, which is cited here for the record. It proposes that the implementing agreement should state:

> "The current rules and working conditions applicable to train dispatchers in the Denver, Colorado office shall be the applicable collective bargaining agreement in the consolidated train dispatching center in Denver,

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[13]See Carrier Appendices 13 & 14 RLEA v. Wheeling & Lake Erie Railway & Norfolk & Western Railway (Civil Action No 90-0597-A), U.S. District Court for the Eastern District of Virginia, Alexandria Division, July 11, 1990.

Colorado."[14]

The BLE-ATDD, like the company, held from the time that the December 3, 1993 Notice was issued under New York Dock Article I (4.) until negotiations over an implementing agreement reached an impasse, that a collective bargaining agreement for the consolidated Denver dispatchers was a negotiable item as part of the implementing agreement. The BLE-ATDD just had a different view of which agreement(s) should apply to the consolidated dispatchers in Denver. Although the company disputes that this written document was ever presented to its negotiators at the February 8, 1994 negotiating session, the BLE-ATDD presents that written set of proposals, with amendments, to the arbitrator in this forum as its

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[14]See company's Post-Hearing Ex. 17. Section 1 (B). This proposal at first reading appears to be a pure tautology which states that the applicable agreement shall be the applicable agreement, when the question of an "applicable" agreement is precisely the issue at stake. The insertion of the adjective, "...current..." as modifier of "...rules and working conditions..." in the first part of the sentence, however, permits construction of that sentence to mean that the SPL still thinks that the DSC-D&RGW agreement is the one which should cover all dispatchers in the new Denver dispatching facility. It is clear from the SPL's submission that it believes that the BLE-ATDD, because it now has full representation rights over all SPL dispatchers, must use as basis the DSC-D&RGW agreement in Denver for any Section 6 filing. That position can be compared with the SPL's original position which states that DSC is the Denver bargaining agent, not the BLE-ATDD. The SPL states that "...the determination of the NMB in its single carrier ruling does not impact any of the issues presently before the Board...". This cannot be accepted at face value here since the SPL, because of that ruling, has changed its final proposal on Section 1 of the Implementing Agreement. As an addendum, and in what it calls a show of good faith, after the SPL argues that the BLE-ATDD ought use only the DSC-D&RGW contract in Denver as basis for a new, negotiated labor agreement, the SPL lists issues it deems pertinent to negotiations in Denver with the BLE-ATDD after a Section 6 filing takes place. See company Post-Hearing Brief @ 3-5; 39-42 & Post-Hearing Ex. 22.

last offer on an implementing agreement.[15] Of interest here is only that aspect of the proposals which addresses the question of collective bargaining contract for the dispatchers in Denver. For the record, the BLE-ATDD have proposed in negotiations, and continue to propose before this arbitration forum, the following.

> "The current SP/ATDA (Western Lines) Agreement(s) shall remain applicable to positions relocated from Roseville to Denver, the SP/ATDA (Eastern Lines) Agreement(s) shall remain applicable to positions relocated from Houston to Denver, until such time as the parties fulfill their commitment to reaching a single agreement.
>
> "Should a single working agreement be reached prior to the relocation train dispatchers' seniority will be dovetailed into a single seniority roster. Should two or more dates be the same, the standing on the roster will be determined by (1) length of service with the company, (2) age, or (3) lottery between those involved."[16]

The BLE-ATDD diverges from the stated, if not real, position of the company by proposing that this New York Dock forum resolve not only the issue of an implementing agreement, but also the issue of the proper collective bargaining agreement(s) which ought to apply to the dispatchers at Denver, as part of such implementing agreement.

The BLE-ATDD argues that it would be improper to abandon any agreement now in force for the Roseville and Houston dispatchers as these dispatchers move to Denver under the proposed coordination since a January 1, 1991 Agreement signed by the General Chairmen of the Eastern and Western Lines and company representatives contemplated such a consolidation and made allowances for it in the

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[15]See BLE-ATDD Post-Hearing Brief @ 1 referring to that document.

[16]BLE-ATDD Pre-Hearing Exhibit I.

intent of the language contained in that Agreement. Pertinent language of that agreement, according to the BLE-ATDD include but is not limited to the following:

> In the Carrier's letter dated May 16, 1989[17]...the parties agreed to review rates of pay and negotiate a single working agreement to cover the dispatcher offices in Roseville and Houston. To date, no action has been taken to reach that objective. The parties are committed to reaching an agreement, including consolidated rates. It is therefore, agreed:
>
> > 1. The parties shall commence the process of negotiating a single working agreement covering both Roseville and Houston. The agreement will establish uniform working conditions for both offices.
> >
> > 2. .....
> >
> > > (b) Rates of pay as set forth in Attachment A are in consideration of current and future consolidations and restructuring of Southern Pacific Lines train dispatching offices.[18]

This particular agreement was a variant on the national agreement reached that year, at the company's request, because of the

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[17]Which is found in BLE-ATDD Exhibit S. Therein one of the company's Senior Labor Relations' Managers writes, in pertinent part:

> "The current consolidation of the dispatching offices (in Roseville & Houston) will result in two offices on the Southern Pacific from which trains will be dispatched. Upon the completion of the consolidation, it will be the goal of the Carrier and the Organization to reach a single labor agreement covering both of these offices.
>
> "In conjunction with the negotiation of a new, single agreement, the parties will review the status of national negotiations in which the parties are currently engaged, and how such national negotiations or new single agreement affects the adjustments of rates of pay."

[18]See BLE-ATDD Exhibit Z.

economic conditions of the SP.

The BLE-ATDD argues then that after the move to Denver by the dispatchers all will be in a new facility, irrespective of whether they come off the SP-E, SP-W or the D&RGW, since One Corporate Center, which will house the dispatching center, was purchased in 1994 after the Notice of consolidation in December of 1993. The logical thing to do is to consolidate them all under either a new agreement to be negotiated, or at the very least, the SP-W Agreement.[19] According to counsel for the union: "...the simple fact is that there is no agreement in place at the new facility because it is just that, a new facility...It is not a D&RGW facility, it is a (SPL) facility...".

The BLE-ATDD then argues that traditional labor law principles dictate that employees in given collective bargaining units should bring their same contractual protections with them is such units are relocated to new sites.[20]

Given the position of the BLE-ATDD as outlined above its position on the Article 1 (2.)(4.) issue comes as no surprise. If Article 1 (4.), in pertinent part, states the following:

(4.)

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[19] The..."ATDD is willing to accept the application of the Western Lines Agreement to all of the transferring dispatchers" (Emphasis in original).See BLE-ATDD Post Hearing Brief @ 24, fn. 15.

[20]These arguments are cited in passing because they are presented by counsel. Whether, in fact, however, NLRA Section 8 precedent is applicable to a case such as this need not be addressed here since the arbitrator is in a position to reasonably frame conclusions on the issues raised herein without reference to such discussion.

> "...a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix...."

And if Article (2.) states the following:

> (2.)
>
> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (Including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

Then, according to the BLE-ATDD, the dispatchers cannot be moved to the new dispatching center in Denver without their current level of protection from their agreements being preserved.

Ruling

The BLE-ATDD refers to the facts of the instant case as having sui generis status. In comparing precedent cited by both parties, and with the full record before him, the arbitrator believes that such designation is not without foundation. Such is so for a number of reasons. At present, the union which has full representation rights for all dispatchers on the SPL, and consequently for the new dispatching center in Denver, is the one with contracts off the SPT property to which the December, 1993 Notice was directed. On the other hand, the labor organization with a contract for dispatchers off the D&RGW has lost representation status for those employees in view of the recent March 21, 1994 ruling by the NMB. Thirdly, it appears clear from the record that while the company issued a Notice to coordinate the Roseville and Houston dispatchers to Denver, the fact is that the dispatchers from all three current

dispatching points will be coordinated to a totally new dispatching center in Denver. As a matter of fact, as the BLE-ATDD points out, all three groups will be starting at a totally new facility when the dispatching center become operative. There has never been a labor contract covering dispatchers at the new Denver dispatching center because the facility, known as One Corporate Center, where the dispatching center will be located, had not existed prior to One Corporate Center's purchase by the SPTC in March of 1994.

The company's last proposal on an implementing agreement is that the dispatchers have labor contract protections when the coordination takes place at the new dispatching center in Denver which is that of the DSC-D&RGW labor agreement.[21]

The arbitrator is far from convinced, on basis of the record before him, that sustaining the company's position on this matter would produce reasonable, harmonious labor results as all of the SPT's dispatchers are coordinated from their present points to Denver and as the D&RGW dispatchers are moved from their current location in Denver to the new center. To sustain the company's position in these matters would not "...allow the Dispatching Center (at Denver) to become operational with as little disruption...as possible...", to cite the company's own language

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[21]The union argues that all three of the dispatcher groups will be effectively coordinated because the D&RGW dispatchers will also be moved from their current Denver facility to the new Denver dispatching center. The company discounts this argument. The question, however, can be reasonably raised: does it make a difference if the dispatchers are moved two miles, or two thousand miles? Or put otherwise: is this case about geography, or is it about a coordination of all of SPL dispatchers to a new facility? Obviously, it is about the latter.

with respect to objectives to be achieved by means of an implementing agreement. The company's position would effectively put all of the current SPT dispatchers, irrespective of what point they come from when they move to Denver, under a labor arrangement originally applicable to some 10 to 15% of all SPL's dispatchers, and which was negotiated (if that is what happened, which is never really clear) by a labor organization which is not the one which now has the franchise to negotiate for any of SPL's dispatchers. It is true, as SPL states, that a Section 6 can be filed as soon as the BLE-ATDD wishes. But until a new labor agreement is negotiated at the Denver dispatching center, and despite all parties' good faith on this point, that may well take a long period of time under Section 6. In the meantime, the SPL suggests that all dispatchers fall under a contract which the BLE-ATDD argues is either no contract at all,[22] and/or which was negotiated for a minority of the dispatchers at a location which is not even the dispatching location where the new dispatching center will be. For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver despite good faith promises by the company about a future contract which have been made before, but are not properly before, this forum and which, yet on the other hand, have not been tested in an actual Section 6 set of negotiations.

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[22]Which argument is not accepted by the arbitrator. See supra.

To accept the SPL's arguments before this forum would be tantamount to nullifying the labor agreements which it has negotiated with about 85 percent of its dispatchers, with the collective bargaining agent which now represents one hundred per cent of its dispatchers, in favor of an agreement which it has with the other 15 percent under an arrangement with a collective bargaining agent which has lost any and all representation rights.

Indeed, as a matter of logic it might be noted that while the SPL argues, on the one hand, that Article I (4.) of Dock forecloses any conclusions on labor contract issues of the type addressed in Article I (2.), SPL neverthless argues in favor of the BLE-ATDD using the DSC-D&RGW agreement as basis for negotiating a new, single agreement after filing a Section 6 and that reference to the DSC-D&RGW contract be incorporated into the implementing agreement in Section 1, at least elliptically, as stated in the foregoing.[23] SPL even outlines, in its new Section 6 Exhibit, what it would find amenable as amendments "...to incorporate into the former DSC

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[23]There can be no other interpretation given to the phrase: "...the current rules and working conditions applicable to train dispatchers in the Denver, Colorado office..." (company Post-Hearing Ex. 17, Section 1 seq. as outlined earlier). The SPL argues that "...neither the NMB, nor this Board, should become enmeshed in issues of collective bargaining which remain to be resolved between the parties in the future..." (See Post Hearing Brief @ p. 3). This Board cannot avoid such entanglement since both parties propose that the coordinated dispatchers in Denver be covered by different collective bargaining agreements. What the SPL is apparently referencing here is that this Board cannot be party to amendments to whatever agreement(s) are found to be applicable at Denver as they are hammered into a single agreement after a Section 6 filing. Certainly, such negotiations are neither the business of this Board and/or of the NMB.

Denver agreement via the negotiation process."[24]

Beyond the conclusions which state that it would be unreasonable to have the DSC-D&RGW agreement cover all of the dispatchers at Denver when they move to the new dispatching center, there is other information of record which supports the conclusion that sustaining the company's position in these matters would produce an effect which is contrary to the stated, mutual intent of the majority of the parties themselves involved in the coordination. Such mutuality of understanding existed prior to the December, 1993 Notice which was filed by the company and this can be documented.

First of all, the SPT dispatchers' 1991 Eastern Lines' Agreement dealing with rates of pay, at least, unambiguously states, in referencing future consolidations, of which the contemplated move to Denver is certainly one, that such: "rates ...are in consideration of current and future consolidations and restructuring of Southern Pacific Lines train dispatching offices...". The December, 1993 Notice precisely addressed such future consolidation and restructuring, slightly less than three years after the language cited above was framed. The arbitrator cannot justifiably conclude that this language is without meaning. Secondly, the parties set as objective the achievement of one agreement for dispatchers off the SPT as early as 1989. At that time, the company stated to the union, also in unambiguous language, that it was the "...goal...(of both)...to reach a single

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[24]See company Post-Hearing Exhibit 22.

labor agreement covering both of these offices (Roseville & Houston)...". That goal had never been reached, for various reasons, but the final consolidation of all dispatchers in the new Denver dispatching center makes such goal now not only a meaningful, logical objective, but the only thing that it is reasonably practicable for the parties to do. It is simply not tenable to conclude that the SPL will not have a single labor agreement with the dispatchers in Denver in the future and all parties to this arbitration know that. Further, the goal of a potential single agreement is enhanced because, unless there is some act of god in the near future to which this arbitrator is not privy, the recent NMB ruling provides the BLE-ATDD with representation rights for all dispatchers now working on the SPL, including those working on the D&RGW, and it can reasonably be opined that one, future labor agreement would cover the latter group also.

In view of the foregoing there is insufficient basis for the arbitrator to conclude here, as he did earlier in a pre-hearing ruling, and at that point without benefit of a full record, that the SP-E Agreement, and the SP-W Agreement as well, since it is intricately tied in with the latter, ought not continue to cover the Roseville and Houston dispatchers off the SPT as they are coordinated to the new Denver dispatching center until these agreements are combined into a single agreement, which latter objective the parties had set for themselves prior to the coordination. Even though the dispatchers to the DSC-D&RGW

Agreement are now represented, by administrative fiat, by the same union as those off the SPT, the arbitrator cannot find any reasonable basis to conclude, here, that the D&RGW dispatchers ought not also remain covered under their own DSC-D&RGW agreement[25] until their collective bargaining status is settled.[26]

All three agreements shall, therefore, be applicable to the new dispatching center in Denver. All three agreements shall continue to the cover the dispatchers that they have in the past. The SPL has already indicated that it wishes to proceed this forthcoming year with bargaining matters with the BLE-ATDD in an expeditious manner. The instant ruling will provide it and the BLE-ATDD with the occasion to do so on basis of agreements already existent which can be amended and/or condensed into one agreement as the parties see fit according to the objectives of unity set forth already by the SPT and the ATDA some five years ago.

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[25]Nor that the BLE-ATDD ought not inherit this agreement as one of the three to be used as basis for negotiating a single agreement by consolidating/amending it in conjunction with the SP-E and SP-W agreements into one agreement. Such conclusion is consistent with BMWE vs Guilford Transportation Industries, Inc (1992) cited the company in Post-Hearing Ex. 20.

[26]Contract portability arguments are simply not pertinent to the instant case in view of the reasoning developed here. Their application would lead to the non-tenable conclusion that none of the dispatchers' agreements should be portable to the new Denver dispatching center, and consequently, that the dispatchers would lose all labor agreement protections until a new, single agreement would be negotiated and ratified. Further, New York Dock Article I (2.) language would become totally meaningless if the dispatchers lost all contract protections, as a side effect of the coordination, during the hiatus between their move to the new dispatching center and the event of a new labor contract.

After studying the reasoning found in ICC's Maine Central (Finance Docket No. 30532) issued in 1985, as well as Article I, Section (4.) arbitration Awards issued thereafter which deal, as this one does, with the relationship between consolidations arising from an ICC order and the Railway Labor Act, the arbitrator is not convinced that the facts of the instant case would do other than uncomfortably fall under the shadow of principles and legal conclusions laid out in some of the above. It was not uncommon for arbitrators to conclude, prior to 1985, as they plainly construed the language found in Dock which was before them at Article I, Section (2.), that this Section was intricately related to Section (4.), and that the language of Section (2.) literally means what it says. Pertinent here is the language which addresses: "...and/or existing collective bargaining agreements or otherwise[27]..." which is found in Article (2.), as well as the language of Article I (4.) which refers to reaching agreement in an implementing agreement "...with respect to the terms and conditions of this appendix..." which pre-1985 arbitrators[28] concluded must obviously include also the Article I (2.) language since it was part of the appendix. It is an inescapable conclusion, in the instant case, that Article I (2.) here has application, by reference, since the parties themselves state, as noted earlier, their desire to extend applicability of agreements to later consolidations, as well as the

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[27]Which would even cover the DSC-D&RGW document which the BLE-ATDD has argued is not a (conventional) labor agreement anyway.

[28]Some later changed their minds on basis of ICC Maine Central (1985).

desire to mesh agreements into one.

While being informed by arbitral precedent after 1985 that the ICC does not specifically state that inconsistencies between Article I, Sections (2.) and (4.) are to be resolved in favor of Section (4.), as the company here would argue, we are nevertheless advised by some arbitral precedent that such "...conclusion is inescapable...".[29]. Even if such were so, strong arguments could be made here that any inconsistencies which may exist between Sections (2.) and (4.) of Article I, applicable to the vast majority of dispatchers involved in the instant case, are less than obvious.[30]

An Implementing Agreement for the New, Denver Dispatching Center

Positions of the Parties: Discussion

The issue of what collective bargaining agreement(s), if any, shall cover the dispatchers off the SP-E, SP-W and the D&RGW in the

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[29]See company Pre-Hearing Exhibit 10.

[30] There are legal arguments and conclusions associated with the history of Dock Article I (2.)/(4.) issue(s), the ICC Maine Central Railroad Co. case, and arbitration conclusions emanating therefrom which merit further reflections but which cannot be resolved here. Suffice it to mention what appears to be the curious, legal conclusion that an ICC Order may supersede collective work place protections for employees covered by provisions of a federal labor statute (RLA); that New York Dock Conditions provide protections to individual employees, which they certainly do, but not to collective bargaining representatives when the latter are inextricably bound to labor contracts outlined in Article I (2.); that Article I (2.) explicitly addresses "...existing collective bargaining agreements...", yet Maine Central appears to obfuscate any meaning which that language might have, if its interpretation according to some arbitrators is correct, and so on.

Denver dispatching center until a single collective bargaining agreement is reached between the representative for the dispatchers and the SPL is ruled on in the preceding section of this Award. Such will be taken into account by the arbitrator when final draft of an Implementing Agreement is presented.

Preamble of the SPL's last proposal refers to the rearrangement, transfer and consolidation of dispatching forces from Houston and Roseville "...into the existing train dispatching office in Denver, Colorado...". Such rendition of facts may have been correct at the time of the Notice of consolidation in December of 1993. But such is no longer correct since March of 1994. As noted in the foregoing, the record sufficiently establishes that a more proper rendition of the facts of the situation is that the Dispatchers off the SP-E and the SP-W will not be transferred and consolidated into an existing train dispatching office in Denver, but rather that the SP-E, SP-W and the D&RGW Dispatchers shall all cumulatively be consolidated in a new dispatching center which is being set up in a totally new facility purchased by the SPTC in March of 1994, some three months or so after the original transaction Notice was issued to the SP-E and SP-W Dispatchers. These facts will be taken into account by the arbitrator when a final draft of the implementing agreement is presented.

The company argues that the BLE-ATDD attempts to support its position with respect to certain substantive items it wishes in a Denver Implementing Agreement by citing as reference other Implementing Agreements as precedent. The company is specifically

referring to Implementing Agreements signed between the ATDA and railroads merged into the SPL as result of Notices issued from March 1, 1988 through January 10, 1989.[31] The company's argument that each of these prior agreements, however, cannot serve as precedent because of a disclaimer in each of those agreements, to that effect, is accepted by the arbitrator.[32]

The company reiterates in all arguments and documentation provided to the arbitrator on this case that in its view this New York Article I (4.) forum ought to limit itself to the narrow issues of "...seniority and selection of forces' concerns...". [33] The SPL proposes, before this Board, its last offer in Article I (4.) negotiations, [34] plus amendments. In its Post-Hearing Brief it explains that there are still certain issues in its proposal for an Implementing Agreement before this Board which may go beyond its

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[31]See Pre-Hearing BLE-ATDD Exs. L through O.

[32]Pertinent language in each of these four Agreements, which reads the same in every one of them, reads as follows:

> "The provisions of this Memorandum of Agreement have been designed to address a unique situation. Therefore, the provisions of this Memorandum of Agreement and Letters of Understanding attached were made without prejudice to the position of either party and will not be cited as a precedent in the future by either party."

Found on signature page of all Agreements cited by the BLE-ATDD in Pre-Hearing Exs. L through O.

[33]Arguendo, the issues of a labor contract at Denver having already been dealt with by the arbitrator in the foregoing.

[34]See BLE-ATDD Ex. J.

stricto dicto view of what Article I (4.) requires but nevertheless it is able to "live with" certain provisions in order to expedite matters and get an Implementing Agreement in place.[35] According to the SPL, it has deleted Sections 4(a)&(b), 7(d) and 9 (in totality) proposals from it final negotiation position and presents this to the Board for consideration. Section 4(a)&(b) deals with Houston & Roseville dispatchers' separation allowance benefits under Article I (7.) of New York Dock and details with respect to how the monies are to be received, etc.; Section 7(d) deals with advances of lump sums for dispatchers electing to relocate; and Section 9 deals with parking privileges for dispatchers working various shifts once at the Denver dispatching center.[36] The comparison of the two proposals in question also show change in language in Section 1 as noted earlier by the arbitrator. The company argues that the following issues should be excluded from an implementing agreement.

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[35]At the hearing the arbitrator addressed the issue of a "door having been opened during negotiations over various items in an implementing agreement" which might provide passage for including those same items in an arbitrated agreement. The SPL has responded, which the BLE-ATDD has not denied, that it did go beyond what was considered narrow Article I (4.) items in negotiations in order to get an agreement, and avoid arbitration. As a further gesture, as noted, the SPL has included in its final offer items which go beyond what it thinks are strictly required per a New York Dock arbitration. See company Post-Hearing Brief @ p. 22.: "There is no doubt that the Carrier proposed, during negotiations, substantive terms different than New York Dock. There is nothing in Article I (4.) that precludes the parties from voluntarily agreeing to a substantive set of benefits in addition to those specifically required by Appendix III."

[36]See company's Post-Hearing Brief @ pp. 8-9; Exhibit 17.

(1) Parking. This is not an Article I (4.) issue. Further, no other employees at Denver have parking privileges. (BLE-ATDD Side Letter 6)

(2) Ban on Realignment of Train Dispatcher Territories Without Involvement of the Action Council. This is not an Article I (4.) issue. This is a managerial prerogative not related to assignment & selection of forces. The company argues that this would "handcuff" it from "...making certain positive initiatives inherent in the transaction...". (BLE-ATDD Side Letter 13)[37]

(3) A Thirty (30) Day Training/Qualification Period. This is not an Article I (4.) issue. This is a managerial prerogative. Further, the company has suggested a $5,600 train waiver sum which it interprets as simply a stipend. (BLE-ATDD Side Letter 10)

(4) Fencing Arrangement. A One Year Ban On Displacements Or Bumping. This would place restraints on the company to assign forces, under a bumping or displacement situation, for a period of one year after first assignment of a dispatcher at the Denver dispatching center. According to the company, such constraint would create a "...logistical nightmare..." SPL argues that this is a specific job right issue which is not covered by New York Dock at Article I (4.) or any other agreement in effect "whether it be DSC or ATDD..."[38] The method of selection of forces ought be dealt with by dove-tailing the seniority roster. (BLE-ATDD Side Letter 2)

(5) A Penalty Assessed the Company On Monetary Benefits If the Transaction Is Not Completed By April 1, 1995. This issue is not properly an Article I (4.) one.[39]

The final position of the BLE-ATDD on an implementing agreement before this Board is the last proposals which it offered orally to the SPL during the last round of Article I (4.)

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[37]Also see BLE-ATDD Pre-Hearing Submission @ pp. 24 seq. & BLE-ATDD Exs. Q & V inter alia, on the Action Council and Memorandum Agreements relative to this Council.

[38]See company Post-Hearing Submission @ p. 24.

[39]See BLE-ATDD Pre-Hearing Submission @ pp. 25 seq. under title of Issue No. 12.

negotiations which were held on February 8, 1994, with amendments.[40] To this effect, counsel for the BLE-ATDD explains as follows:

> "In this arbitration the union is willing to accept an implementing agreement which omits the following provisions from that last proposal (orally offered on 2-8-94): Sections 4, 5, 6 & 8, and Side Letters 4, 7, 8, 11, 12, 14 --- provided that the agreement recites that the precise provisions of New York Dock apply to those incidents of the transaction not otherwise specifically addressed in the agreement (i.e. moving expenses, losses from home removal)."

The amendments represent the following deletions from the BLE-ATDD's last bargaining proposal. They are, in pertinent part, the following.

> (1) Section 4. Separation Allowance issues dealt with under Article I (7.) of New York Dock.
>
> (2) Section 5. Moving Expenses issues dealt with under Article I (9.) of New York Dock.
>
> (3) Section 6. Loss for Home Removal dealt with under Article I (12.) of New York Dock.
>
> (4) Section 8. Lump Sum Payments/Moving Expenses.
>
> (5) Side Letter No. 4. Deleted in conjunction with Section 4 above.
>
> (6) Side Letter No. 7. Deleted in conjunction with Section 5 above.
>
> (7) Side Letter No. 8. Delete letter addressing protections under Article 7 of SP-W Agreement.
>
> (8) Side Letter No. 11. Delete training waiver in lieu of cited sum.
>
> (9) Side Letter No. 12. Delete cited allowance for dispatchers displacing to Denver over term of two years.
>
> (10) Side Letter No. 14. Delete 2% monetary benefit to be

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[40]See BLE-ATDD Pre-Hearing Ex. I & Post-Hearing Brief @ p. 1

provided to dispatchers if transfer of forces to Denver have not be completed by April 1, 1995.

Findings

Arbitral findings here will address the following.

(1) Those issues raised by the parties which are New York Dock issues but not subject to Article I (4.). Detailed exceptions applicable to the Implementing Agreement are noted per proposals by the parties.

(2) Those issues raised by the parties which are not subject to an arbitrated Implementing Agreement.

(3) Those issues raised by the parties which may properly belong in an arbitrated Implementing Agreement to cover the coordination of Train Dispatchers to SPL's new, Denver, Colorado dispatching center.

Issues Raised by the Parties Which Are New York Dock Issues Not Subject to Article I (4.)

For all SPL Train Dispatchers displacing to the SPL's new, dispatching center in Denver, Colorado: the issue of displacement allowances shall be covered by Article I (5.) of New York Dock Conditions; the issue of separation allowances shall be covered by Article I (7.) of New York Dock Conditions; the issue of moving expenses shall be covered by Article I (9.) of New York Dock Conditions with exceptions/amendments as contained in the Implementing Agreement; and the issue of loss for home removal shall be covered by Article I (12.) of New York Dock Conditions with exceptions/amendments as contained in the Implementing Agreement. The first three issues cited above are subject, in individual cases, to arbitration procedures as outlined in Article I (11.) of those same New York Dock Conditions.

Issues Raised by the Parties Which Are Not Subject to An Arbitrated Implementing Agreement

The issues of parking privileges; the realignment of train dispatching territories per action of an Action Council; a thirty day training/qualification period; and a one year ban on displacement or bumping after first assignment of a Dispatcher in the SPL's new, Denver dispatching center are not Article I (4.) issues and must more properly be dealt with by the parties in some other forum.

The Implementing Agreement

The Implementing Agreement accompanying this Award takes into account the final proposals by the parties with respect to such an Agreement. These proposals and accompanying arguments have been presented by means of exhibits and briefs, and by means of arguments provided in arbitral hearing. In accordance with the instant Findings the Agreement outlined here shall apply to the Train Dispatchers who are being coordinated to the SPL's new, consolidated dispatching center at Denver, Colorado. Such Agreement further takes into account the SPL's observations and comments with respect to the need for the company to reach new productivity levels and a new posture of competitiveness, if it wishes to remain a continuing, viable railroad in the U.S. transportation industry.[41] As a matter of principle, it may be more salutary for parties to any negotiable employer-employee Agreement, whether

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[41] "The purpose of the consolidation of train dispatching functions is to address the service performance and customer satisfaction problems...(which the SPL is currently experiencing)...". See company's Post-Hearing Brief @ 7 inter alia.

under federal or state labor law(s), or under provisions such as those found in New York Dock, if they could mutually arrive at their own understandings on framing such an Agreement. The weight of the history of employer-employee relations in the railroad industry, and in other industries in the U.S. provides evidence to support such principle. Evidently, however, the parties concluded that there were sufficient complexities associated with the instant case that such was not possible. An arbitrated Implementing Agreement, therefore, for the Southern Pacific Lines and its Train Dispatchers, represented by the American Train Dispatchers Department of the Brotherhood of Locomotive Engineers, is found in Appendix I attached to this Award. That Agreement is incorporated herein as integral part. That Agreement shall govern the transaction involved in the Southern Pacific Lines' coordination of its Train Dispatchers to its new, Denver, Colorado dispatching center.

Award

The parties to this proceeding shall be bound by the conclusions outlined in the instant Findings, and by the Implementing Agreement which is integral part of this Award and which is attached hereto as Appendix I.

Edward L. Suntrup, Arbitrator

Michael S. Wolly
Zwerdling, Paul, Leibig, Kahn,
Thompson & Driesen
Washington, D. C.
Representing the BLE-ATDD

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Southern Pacific Lines
San Francisco, California
Representing the SPL

Denver, Colorado

Date: 5-25-94

APPENDIX I

Arbitrated Implementing Agreement

between

Southern Pacific Lines

and

Train Dispatchers
Represented by
American Train Dispatchers Department
Brotherhood of Locomotive Engineers

MEMORANDUM OF AGREEMENT

between

Southern Pacific Lines (SPL)

and

American Train Dispatchers' Department
Brotherhood of Locomotive Engineers (BLE-ATDD)

This arbitrated Agreement provides for the rearrangement, transfer and consolidation of all of the Southern Pacific Lines' Dispatchers to the company's new, dispatching center at Denver, Colorado.

Section 1

(A) The rearrangement, transfer and consolidation of train dispatching forces will commence on or after April 1, 1994 and continue until fully implemented.

(B) The following three collective bargaining agreements shall remain in effect, and shall continue to cover the Dispatchers whom they covered prior to the coordination to the new, dispatching center at Denver, until the Southern Pacific Lines and the American Train Dispatchers' Department of the Brotherhood of Locomotive Engineers reach a single collective bargaining agreement to cover all Dispatchers at the new coordinated facility:

(1) Southern Pacific-American Train Dispatchers Association (Western Lines) Agreement (ATDA-SP-W Agreement);

(2) Southern Pacific-American Train Dispatchers Association (Eastern Lines) Agreement (ATDA-SP-E Agreement);

(3) Denver & Rio Grand Western-Dispatchers Steering Committee Agreement (DSC-D&RGW Agreement).

(C) All Train Dispatchers' seniority on the SPL will be dovetailed into a new, single, seniority roster. Should two (2) or more dates be the same, standing on the roster will be determined by: (1) length of service with the SPL, or with any present or former corporate railroad entity which has merged to form the SPL; (2) age; or (3) lottery between those involved.

Section 2

(A) Initial assignment of Train Dispatchers being transferred to the new, dispatching facility shall be by advertised Bulletin. Bulletins on all positions in Denver: (1) shall be posted at all locations where SPL Dispatchers currently work and/or; (2) shall otherwise be made available to all SPL Train Dispatchers. Vacancies occurring in the Denver dispatching center will be filled in accordance with seniority on the new, single, dovetailed seniority roster.

(B) An employee who currently holds seniority as a Train Dispatcher and who has been promoted within the company, or who occupies a full-time position with the union, or who has been on any other authorized leave of absence, and who returns to the train dispatching services as a Train Dispatcher, shall be allowed to follow the work of his or her former office to the new Denver dispatching center in accordance with their seniority on the new, single, dovetailed seniority roster. Such employees shall receive all permissible benefits which would accrue to Train Dispatchers, as of the date of this Agreement, under New York Dock Conditions, and under this Implementing Agreement, if they return to train dispatching services on the SPL within five (5) years from the date of April 1, 1994 except as follows: they shall be entitled to no New York Dock benefits under Article I (9.) and (12.). If disputes arise with respect to what other New York Dock benefits these employees returning to the Dispatchers' craft should receive, such disputes may be resolved by resort to the provisions of New York Dock Conditions, Article I (11.).

(C) Should the Company re-establish train dispatching offices in the territory encompassed by the SPL, Train Dispatchers remaining in the service of the Company as Train Dispatchers who are currently covered by the ATDA-SP-E and ATDA-SP-W Agreements, and who were required to relocate and did relocate under this Implementing Agreement, shall have the option to return to the location from which they relocated.

Section 3

(A) For purposes of this Agreement, the twelve (12) month period used for the calculation of test period average compensation and time paid set forth in Article I (5.)(a), second paragraph, of the New York Dock Conditions, shall be the following: April 1, 1993 through and including March 31, 1994.

(B) Representatives of the BLE-ATDD who were absent on any day during the test period from their regular train dispatching assignment, and representatives of the DSC who were absent on any

day during the test period from their regular train dispatching assignment prior to March 21, 1994, and who lost actual time therefrom in order to attend meetings or perform other union related functions will, for the purposes of calculating such test period averages, be considered as having performed service on such days. Further, such days shall also be included as qualifying time for other benefits such as vacations and so on.

Section 4

(A) Train Dispatchers working for the SPL who are subject to this Implementing Agreement shall, within one hundred (100) days of the retroactive date of this same Agreement, which is April 1, 1994, advise the Company in writing if he/she intends to relocate to the new, Denver dispatching center.

(B) The Company will furnish each individual Train Dispatcher covered by the ATDA-SP-E and ATDA-SP-W Agreements who indicates that he/she intends to relocate, an informational manual to assist in their relocation. Said manual will be furnished upon the Train Dispatcher's written notification of intent to relocate. Train Dispatchers under the DSC-D&RGW Agreement who already work in the Denver area shall receive no relocation benefits, of any kind, under this Implementing Agreement.

(C) The Company will also make arrangements to have a relocation company assist Dispatchers who are covered by the ATDA-SP-E and ATDA-SP-W Agreements obtain a place of residence in the Denver area. The agency will show the new resident such things as transit systems and local neighborhoods. The Train Dispatcher will be advised of a specific person at the relocation company to contact.

Section 5

(A) In the event that there is more than one employee in a household entitled to benefits under New York Dock Conditions, Article I (9.) and (12.), who is covered by either the ATDA-SP-E or the ATDA-SP-W Agreements, or any other company policy, there will be no duplication of payments. The employee not receiving the stated benefits, however, will be entitled to seven (7) days' lost wages, and a two hundred dollar ($200.00) meal allowance. Lost wages and meal allowance payments shall be made to said employees by the Company within thirty (30) days of reception of meal receipts by the company from the employee.

(B) In the event that a residence of a Dispatcher who is covered by either the ATDA-SP-E or ATDA-SP-W Agreement is jointly owned with someone other than the Train Dispatcher and his/her spouse, the provisions of this Agreement will only apply to that portion of the residence owned by the Train Dispatcher.

Section 6

(A) Train Dispatchers under the ATDA-SP-E and ATDA-SP-W Agreements who are involved in the transition to the new, Denver dispatching center, and who therefore perform service at the Denver center in advance of the consolidation, will be allowed expenses sufficient to cover their travel costs and reasonable living expenses. Payment for lodging in Denver will be paid through direct billing to the company.

(B) During the period of time the Company requires a Train Dispatcher covered by the ATDA-SP-E or ATDA-SP-W Agreements to remain in his/her former office, after the Train Dispatcher has vacated his/her former residence and established a permanent residence in Denver, the Train Dispatcher will be allowed reinbursement for his/her own reasonable out-of-pocket expenses.

(C) If the intended move by a Dispatcher covered by the ATDA-SP-E or ATDA-SP-W Agreements to the new, Denver dispatching center is not made on the designated date, after the Dispatcher and/or his or her dependents have vacated their residence or commenced moving, the Company shall provide suitable lodging and reasonable and necessary expenses for the individual Train Dispatcher and his or her dependents. It is understood by all parties that reasonable delays may take place, beyond the control of the Company and/or the Dispatcher, and that dates for intended relocations may change after residences have been vacated. Expenses shall continue to be paid by the company on a day to day basis, for a reasonable period of time, until the employee is released to proceed to his or her new location in Denver.

(D) It is understood that the transfer date for Dispatchers covered by the ATDA-SP-E and ATDA-SP-W Agreements may be subject to change or may be different for each individual Dispatcher. Such date may be extended without penalty to the Company provided the Dispatcher in question has not formalized arrangements to vacate residence or has not commenced moving.

Section 7

A Train Dispatcher working for the SPL shall cease to be protected by this Implementing Agreement in case of his or her disability, resignation, death, dismissal for cause in accordance with current applicable rules, or currently applicable or future applicable collective bargaining agreement(s), or failure to accept employment in another craft, or failure to accept employment as provided in the currently applicable or future collective bargaining agreement(s).

Section 8

This Agreement constitutes an arbitrated Implementing Agreement. Except as specifically modified by this Agreement, all terms and conditions contained in New York Dock Conditions for the protection of Train Dispatchers who are currently covered by the ADTA-SP-E, ATDA-SP-W, and DSC-D&RGW Agreements, are incorporated herein and shall apply to all Train Dispatchers who become adversely affected as result of the consolidation of SPL's train dispatching offices to the new, Denver dispatching center.

Section 9

The provisions of this Implementing Agreement address a specific and unique situation. Its provisions shall not serve as precedent in the future by any party.

Section 10

All provisions contained in this Implementing Agreement shall be retroactive to April 1, 1994.

Denver, Colorado

Dated: May 25, 1994

ATDA EXHIBIT G

In the Matter of the Arbitration between: CONSOLIDATED RAIL CORPORATION AND MONONGAHELA RAILWAY COMPANY, Carriers, and UNITED TRANSPORTATION UNION(E), Organization.	Pursuant to Article I, Section 4 of the New York Dock Conditions ICC Finance Docket No. 31875 **OPINION AND AWARD**

Hearing Date: September 24, 1992
Hearing Location: Pittsburgh, Pennsylvania
Date of Award: October 29, 1992

JOHN B. LaROCCO
ARBITRATOR
928 Second Street, Suite 300
Sacramento, California 95814-2278

STIPULATED ISSUES IN DISPUTE

(1) Does the Referee have the authority under New York Dock to determine whether the Conrail or the MGA Schedule Agreement will apply on the consolidated operation.

(2) If the answer to question (1) is yes, subsequent to the consolidation of the Monongahela Railway Company operations into Consolidated Rail Corporation, will the collective bargaining agreements applicable to Locomotive Engineers and Locomotive Firemen formerly employed by Monongahela Railway Company be:

(a) the collective bargaining agreements governing rates of pay and working conditions of Locomotive Engineers and reserve engine service employees on Conrail; or

(b) the collective bargaining agreements applicable to the employees on the Monongahela Railway Company prior to the consolidation?

OPINION

I. INTRODUCTION

On October 10, 1991, the Interstate Commerce Commission (ICC) approved the Consolidated Rail Corporation's application to merge the Monongahela Railway Company (MGA) into the Consolidated Rail Corporation (Conrail).[1] Consolidated Rail Corporation-Merger-Monongahela Railway, I.C.C. Finance Docket No. 31875 (Decision dated October 4, 1991). To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Conrail and the MGA pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

This arbitration is conducted pursuant to Section 4 of the New York Dock Conditions.[2] Pursuant to an agreement memorialized by an August 27, 1992 letter, the Carriers and the Organization appointed the undersigned as Arbitrator in this matter and stipulated to the issues in dispute which appear on the title page of this Opinion.

Both parties filed lengthy prehearing submissions. The Arbitrator entertained oral argument during the September 24, 1992 hearing. At the Arbitrator's request, the parties waived the thirty

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[1] The term "Carriers" in this Opinion refers to the MGA and Conrail.

[2] All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Arbitrator will only cite the particular section number.

day time limitation, set forth in Section 4(a)(3) of the New York Dock Conditions, for issuing this Award.

II. BACKGROUND AND SUMMARY OF THE FACTS

The MGA, which consists of 162 miles of track in Pennsylvania and West Virginia, was, for many years, jointly owned by Conrail, the Pittsburgh and Lake Erie Railroad (now the Three Rivers Railroad) and, one of the predecessor companies of CSX Transportation, Inc. Ninety-nine percent of MGA's revenue traffic is generated from coal hauling originating at coal fields along MGA's line. In 1990, MGA interchanged eighty-three percent of its coal traffic with Conrail. Besides connecting with Conrail at the north end of West Brownsville, the MGA interchanges with the former Pittsburgh and Lake Erie Railroad at Brownsville Junction and with the CSX at Rivesville, West Virginia.

The MGA is divided into two divisions, west and east. Both divisions meet at Brownsville, Pennsylvania the northernmost point on the MGA. The east division follows the Monongahela River south to Fairview, West Virginia while the west division runs from Brownsville southwesterly through Waynesburg, Pennsylvania to Blacksville, West Virginia.

In 1990, Conrail purchased 100% of the MGA stock and on August 14, 1990, the ICC approved Conrail's application to acquire the MGA. Consolidated Rail Corporation-Control Monongahela Railway Company, ICC Finance Docket No. 31630 (Decided on August 14, 1990) Although the ICC imposed the New York Dock Conditions to protect any employees adversely affected by the acquisition, the Conditions were never

triggered since Conrail did not commence integrating the MGA into Conrail until after the October, 1991 merger.

Pursuant to written notice issued under Section 4 of the New York Dock Conditions, the Carriers notified the Organization, on July 3, 1992, of their intent to consolidate, unify, and coordinate all the facilities and operations of the MGA into the Conrail. The Carrier's notice contemplated that Conrail would completely subsume the MGA, that is, there would no longer be any MGA operations, services, or facilities. In sum, the MGA, as presently constituted, would go out of existence because the entire MGA would accrete into Conrail.

At a meeting held on May 13, 1992, the Carriers presented the Organization with a detailed explanation of the impending consolidation. To fully understand the breadth of the operational changes and the effect of these changes on MGA Engineers, the Arbitrator must initially relate how trains are currently operated over the MGA. Coal producers located along the MGA place car orders with the Conrail. Conrail train and engine crews deliver a train of empty cars to the MGA-Conrail interchange point at West Brownsville, Pennsylvania. MGA train and engine crews report to duty at Brownsville and thus, the empty coal trains frequently sit idle for up to three hours at Brownsville while the MGA crew members are reporting to their on duty point, and being transported to West Brownsville. The MGA crew operates the empty train to the coal producer for loading. Since all MGA crew members are compensated at yard rates, as if they are performing yard service, another MGA crew must relieve the

first crew during the loading operation to avoid paying costly overtime compensation to the first crew. The second crew completes the loading process and operates the train back to West Brownsville where it is interchanged with the Conrail. Under the Carriers' proposed consolidation every facet of current train operations will change substantially. The new on and off duty point for all crews will be Waynesburg, Pennsylvania, a more centralized point than Brownsville. Conrail will run empty trains, originating at either Conway Yard in Pittsburgh or Conemaugh Yard at Johnstown, through West Brownsville to either Waynesburg on the west division or Maidsville on the east division (apparently, crews reporting to duty at the new crew base at Waynesburg will be transported to Maidsville, which is reasonably close to Waynesburg). Since crews will take over the empty trains at Waynesburg, the Carriers predict that a single crew can deliver the empty train to the coal producer, load and return it to Waynesburg within eight hours. Moreover, the Carrier optimistically forecasts that some crews may be able to make two or more turns to some mines.

In addition to a substantial alteration in how trains will operate over the former MGA, many, if not all MGA support activities, will be integrated into similar activities performed on Conrail. Thus, supervision, train and crew dispatching, customer service, and other administrative functions will be totally integrated into Conrail's system wide or regional facilities which presently perform identical functions.

The parties met on May 27, 1992, to discuss the terms and conditions of a New York Dock implementing agreement. According to the Organization, MGA Engineers negotiated with the Carriers for only about thirty minutes because most of the day was spent on negotiations between the Carriers, and MGA Conductors and Trainmen.[3] Despite the short bargaining session, the Carriers and Organization, thereafter, reached a tentative agreement on all issues surrounding the Carriers' proposed consolidation of MGA operations into Conrail, except, the two issues presented to the Arbitrator. The parties deadlocked on whether the MGA Engineers should come under the collective bargaining agreement applicable to Locomotive Engineers on Conrail or remain under the MGA scheduled engineers' agreement.[4] The Carriers served the July 3, 1992 formal notice, under Section 4 of the New York Dock Conditions, to invoke arbitration. Throughout the handling of this dispute on the property, the Organization reserved the right to raise the threshold issue of whether or not this Arbitrator has the authority to determine which collective bargaining agreement will apply to the MGA Engineers subsequent to the coordination.

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[3] Negotiations between the United Transportation Union (C&T) and the Carriers were fruitful. On July 2, 1992, the UTU(C&T) and the Carriers entered into a New York Dock implementing agreement, which among other things provided that the Conductors and Trainmen would be placed under the collective bargaining agreement in effect between Conrail and the UTU(C&T). The MGA agreement applicable to Conductors and Trainmen was terminated.

[4] In anticipation of reaching an arrangement whereby the MGA engineers would come under the agreement applicable to Conrail locomotive engineers, Conrail and the Brotherhood of Locomotive Engineers entered into an implementing agreement, dated September 18, 1992, to cover the consolidation of train operations. The implementing agreement, permits MGA engineers to be governed by the agreement applicable to locomotive engineers on Conrail, and provides that Conrail Engine Service Seniority District E will be expanded to include the entire MGA property.

III. THE POSITIONS OF THE PARTIES

A. The Carriers' Position

The United States Supreme Court and the ICC have both interpreted the Interstate Commerce Act to permit an arbitrator to abrogate a collective bargaining agreements on rail properties effecting an ICC authorized merger.

The Interstate Commerce Act exempts Carriers from all laws necessary to carry out a merger transaction. 49 U.S.C. § 11341(a). In Norfolk Western Railway v. American Train Dispatchers, 111 S.Ct. 1156 (1991), the United States Supreme Court adjudged that the statutory exemption extends to all laws including a railroad's bargaining and agreement obligations under the Railway Labor Act. Recently, consistent with the Supreme Court's ruling, the ICC decided that a collective bargaining agreement cannot impede a railroad's implementation of an approved transaction. CSX Corporation-Control-Chessie System Inc. and Seaboard Coast Line Industries, 8 I.C.C. 2d 715 (1992). Thus, the ICC has firmly ruled that not only are arbitrators free to change provisions of collective bargaining agreements where those provisions impede an authorized merger but also, because the arbitrator is an extension of the ICC, the arbitrator is actually under a duty to abrogate collective bargaining agreements which impair implementation of a transaction. Norfolk Southern Corporation-Control-Norfolk and Western Railway and Southern Railway, 4 I.C.C. 2d 1080 (1988). Therefore, the MGA Schedule

Agreement must give way to the Carrier's necessity to effectuate the transaction.

Continuation of the MGA Schedule Agreement would not just impede, but would defeat the entire merger. The Scope Rule in the MGA agreement prevents Conrail engineers from manning trains beyond the current interchange point at West Brownsville. Unlike the Conrail collective bargaining agreement applicable to Engineers, the MGA agreement does not provide a reasonable and feasible method for the Carrier to establish a new terminal. Thus, Conrail would have to retain the inefficient West Brownsville terminal, more than 25 miles from the proposed Waynesburg crew base. Similarly, under the Carriers' proposed operational arrangement, all engineers will report to Waynesburg, regardless of whether the engineer will be operating on the east or west division, yet the MGA agreement calls for maintenance of extra lists at both South Brownsville and Maidsville. The MGA agreement continues to recognize the craft and class of firemen and so displaced engineers can presumably hold riding firemen positions.[5] On Conrail, the firemen's craft has been eliminated and in its stead, the UTU(E) and Conrail created the reserve engine service employment program. To establish interdivisional service on the MGA, the Carriers' must follow the negotiation and arbitration provisions of Article IV of the October 31, 1985 National Agreement. An arbitrator could impose conditions so onerous that Conrail would be precluded

[5] There are 32 active Engineers on the MGA. Conrail proposes that MGA Engineers be governed by the collective bargaining agreement covering Conrail Engineers and that those employees listed on the MGA Firemen Roster, when not working as Locomotive Engineers, would be governed by the agreement between Conrail and the UTU(E) which covers the reserve engine service craft.

from instituting interdivisional service from Conway yard to Waynesburg. Under the Conrail agreement, if certain conditions are met, Conrail may unilaterally institute interdivisional service. Clearly, the Carriers could not achieve the goals of the transaction if the MGA agreement remains in effect. Therefore, concomitant with his ICC delegated authority, the Arbitrator must place the MGA Engineers under the applicable Conrail agreements.

Under the controlling carrier principle, the Conrail agreement applicable to Locomotive Engineers should apply to MGA Engineers subsequent to the transaction because MGA work and operations will have been completely integrated into Conrail. Railway Yardmasters of America and Union Pacific Railroad, NYD § 4 Arb. (Siedenberg; 5/18/83). Conrail, not the MGA, will operate all trains over the former MGA property. All MGA operations will cease. Conrail will not just be the controlling or dominant Carrier but the sole Carrier. Employees who are transferred to a controlling carrier, as part of a merger must leave their old collective bargaining agreement behind. Norfolk and Western Railway-Exception-Contract to Operate Trackage Rights, (Decided June 27, 1989). I.C.C. Finance Docket No. 30582 [Interstate Railroad Company]. The MGA Agreement becomes obsolete with the advent of consolidated operations totally controlled by Conrail.

The Carriers alternatively argue that even if the New York Conditions, as interpreted by the ICC, do not mandate abrogation of the MGA agreement, it cannot survive on the merged system because the

Locomotive Engineers' contract on Conrail is the only permissible labor contract covering the craft of engineers on Conrail. The ongoing propriety of a single agreement applicable system wide to all Conrail Engineers is preserved by the status quo provisions of the Railway Labor Act. The Northeast Rail Service Act of 1981 carried forward, as Section 708(A), the provisions of the Regional Rail Reorganization Act of 1973, as amended, which appeared in Section 504(D). These provisions provide for one collective bargaining agreement system wide for each certified craft on Conrail. The Conrail Privatization Act of 1986, placed the one system wide agreement per craft provision within the status quo of the Railway Labor Act. Retaining the MGA agreement would establish more than one agreement for the same craft, on Conrail, in direct contravention of statutory law. None of the statutes permit multiple labor contracts covering the same craft in the event of a merger. If the Organization wishes for the MGA Engineers' agreement to survive, it must change the status quo through Section 6 of the Railway Labor Act.

In summary, the Carriers urge the Arbitrator to exercise his delegated authority to provide that the New York Dock implementing agreement contain a provision that the MGA Engineers will henceforth come under the applicable collective bargaining agreements between Conrail and its craft of Locomotive Engineers and Reserve Engine Service Employees.

B. The Organization's Position

The Organization questions whether or not an arbitrator adjudicating disputes under Section 4 of the New York Dock Conditions, has the authority to abrogate existing collective bargaining agreements unless the Carriers first exhaust the negotiation procedures mandated by the Railway Labor Act. Rather, the Arbitrator is limited to fashioning an implementing agreement which provides for a fair and equitable rearrangement of forces. Furthermore, Section 2 of the New York Dock Conditions preserves existing collective bargaining agreements.

In Brotherhood Railway Carmen v. Interstate Commerce Commission, the Court of Appeals for the District of Columbia Circuit decided that the statutory exemption in the Interstate Commerce Act did not empower the ICC to override collective bargaining agreements. 880 F.2d 562 (D.C. Cir. 1989). Early arbitration decisions issued under Section 4 of the New York Dock Conditions determined that arbitrators may not simply eradicate collective bargaining agreements. Norfolk and Western Railway Company and Railway Yardmasters of America, NYD § 4 Arb. (Sickles 12/30/81). Norfolk and Western Railway/Illinois Terminal Railroad and Brotherhood of Locomotive Engineers, NYD § 4 Arb. (Zumas; 2/1/82)

Conrail failed to show that it is necessary to apply its own work rules across the MGA territory. When feasible, employees in coordinated territories must continue to be governed by their own work

rules. Chesapeake and Ohio Railway/Baltimore and Ohio Railway and United Transportation Union, NYD § 4 Arb. (Cluster; 8/7/85).

Even if this Arbitrator has the authority to abrogate the MGA agreement, the absence of the MGA agreement would undermine an orderly selection of forces. Trying to equitably divide work between Conrail Engineers and MGA Engineers will be chaotic without the MGA agreement.

Since the MGA and the Organization recently renegotiated the MGA agreement, the Carriers obviously realized that leaving the MGA agreement intact would hardly impede the impending consolidation. Stated differently, if the MGA agreement is such an obstacle to the institution of consolidated and merged operations, the Carriers should not have negotiated a new schedule agreement back in March, 1992. Even though the Carriers have not shown that retention of the MGA agreement would thwart the establishment of consolidated operations, the Organization is willing to negotiate with the Carriers over existing rules in the MGA agreement to the extent that the rules might impinge on the institution of efficient consolidated operations. Changes in agreement language to accommodate specific operational problems can be negotiated without violently destroying the MGA agreement. The selection of forces should be done with as little intrusion into collective bargaining agreements as possible. Burlington Northern Railroad and United Transportation Union, MCC § 4 Arb. (Vernon; 3/29/91).

MGA Engineers would endure tremendous monetary hardship if they are placed under the agreement applicable to Conrail Locomotive

Engineers. In several respects including a higher reduced crew differential, the compensation for MGA Engineers in the MGA Schedule Agreement is greater than the compensation afforded to Conrail Engineers. Also, transferring the on and off duty point to Waynesburg will also cause personal hardships for many employees who have purchased residences based on reporting to work in Brownsville.

The Organization concludes that the Arbitrator lacks the authority to nullify the MGA agreement and, alternatively, and assuming that the Arbitrator holds such authority, the Arbitrator should retain the MGA agreement for current MGA Engineers.

IV. DISCUSSION

In 1991, the United States Supreme Court definitively resolved the decade long dispute over whether or not the ICC and arbitrators, who fashion implementing agreements under Section 4 of the New York Dock Conditions, had the authority to change, alter, or abrogate existing collective bargaining agreements. In Norfolk and Western Railway Company v. American Train Dispatchers/CSX Transportation Inc., v. Brotherhood Railway Carmen, the Court unequivocally ruled that Section 11341(a) of the Interstate Commerce Act permits the ICC and New York Dock arbitrators to exempt railroads from existing collective bargaining agreements to the extent necessary to carry out ICC approved transactions. 111 S.Ct. 1156 (1991).

The Court observed:

> "Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC approved transaction makes sense of the consolidation provisions of the Act, which were designed to

promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." Texas v. United States, 292 U.S. 522, 534-535, 54 S.Ct. 819, 825, 78 L.Ed. 1402 (1934). The Act requires the Commission to approve consolidations in the public interest. 49 U.S.C. § 11343(a)(1). Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to transferred employees" as well as "the loss of seniority rights," United States v. Lowden, 308 U.S. 225, 233, 60 S.Ct. 248, 252, 84 L.Ed. 208 (1939), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. 49 U.S.C §§ 11344(b)(1)(D), 11347; See also New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979). Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If § 11341(a) did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, e.g., Burlington Northern R. Co. v. Maintenance Employees, 481 U.S. 429, 444, 107 S.Ct. 1841, 1850 95 L.Ed.2d 381 (1987) (resolution procedure for major disputes "virtually endless"); Detroit & T. S. L. R. Co. Transportation Union, 396 U.S. 142, 149, 90 S.Ct. 294, 298, 24 L.Ed.2d 325 (1969) (dispute resolution under RLA involves "an almost interminable process"); Railway Clerks v. Florida East Coast R. Co., 384 U.S. 238, 246, 86 S.Ct. 1420, 1424, 16 L.Ed.2d 501 (1966) (RLA procedures are "purposely long and drawn out"). The immunity provision of § 11341(a) is designed to avoid this result.

"We hold that, as necessary to carry out a transaction approved by the Commission, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers. We affirm the Commission's interpretation of § 11341(a), not out of deference in the face of an ambiguous statute, but rather because the Commission's interpretation is the correct one." 111 S.Ct. 1165, 1166

After the Supreme Court handed down its decision, the ICC, as it had done several times in the past, determined that arbitrators working under the delegated authority of the ICC, may write implementing agreements which exempt approved transactions from the Railway Labor Act and collective bargaining agreements subject to the Railway Labor Act. CSX Corporation-Control-Chessie System Inc., and Seaboard Coast Line Industries, 8 I.C.C. 2d 715 (1992). In that decision, the ICC expressly commented on the standard for determining whether or not the statutory exemption should be applied to a particular transaction. The ICC wrote:

> "Furthermore, the "necessity" predicate is satisfied by a finding that some "law" (whether antitrust, RLA, or a collective bargaining agreement formed pursuant to the RLA) is an impediment to the approved transaction. In other words, the necessity predicate assures that the exemption is no broader than the barrier which would otherwise stand in the way of implementation. It constrains the breadth of the remedy, not the circumstances under which it applies. 8 I.C.C. 2d 715, 721-722 (1992).

The ICC has thus decided that collective bargaining agreements must yield to the extent that the agreement provisions are impediments to carrying out an approved transaction.[6]

As the Organization points out, several arbitration decisions issued under Section 4 of the New York Dock Conditions in the early 1980's, found that, in view of the language in Section 2 of the Conditions, collective bargaining agreements must be preserved even if continuation of the agreements rendered it is infeasible for a

[6] Since the Arbitrator derives his authority from the ICC, the Arbitrator must strictly follow the ICC's pronouncements.

railroad or to realize the benefits (or efficiencies) of the transaction. However, the U.S. Supreme Court's holding, which overruled the D.C. Circuit Court of Appeals decision cited by the Organization, leaves no doubt that Section 4 prevails over Section 2.

Therefore, this Arbitrator is vested with the authority to decide the second question at issue, that is, whether the MGA Locomotive Engineers should remain under the MGA agreement or be placed under the agreement applicable to Conrail's Locomotive Engineers.

In this case, the Carriers presented overwhelming evidence that retention of the MGA agreement would effectively block the establishment of consolidated train operations and thus, completely undermine the ICC approved merger. Under the proposed consolidated operation, the prior distinction between MGA operations (and its employees) and Conrail operations (and its employees) will not just become blurred, but, rather, will be totally eliminated. MGA Engineers will be fully integrated into the Conrail system. They will no longer be identifiable (except to the extent that the Engineers might hold equity, preferential or prior rights over trains operating on the former MGA property).[7] Operations over Conrail and the former MGA will be homogenous. There will not be any interchange between Conrail and the MGA, because, pursuant to the ICC's authorization, they will henceforth constitute one railroad.

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[7] The MGA Engineers will also be identifiable for purposes of dispensing New York Dock protective benefits.

The absence of separate and distinct MGA train operations militates against retaining the MGA agreement. The Carriers persuasively pointed out that the MGA agreement could operate in numerous ways to effectively bar the institution of merged operations. As part of its approval of the merger, the ICC permitted the Carriers to initiate operational efficiencies, based on economies of scale and improved equipment utilization, to better serve the coal producers along the MGA line. Leaving the MGA agreement intact would certainly prevent the Carriers from changing existing equipment utilization and the present rail traffic patterns. The MGA agreement could bar a Conrail Engineer from operating on the former MGA property, prohibit the establishment of a centralized crew base, and require the Carriers to duplicate many administrative functions already performed by Conrail. Contrary to the Organization's argument, this not a situation where only one or two MGA agreement provisions are hindering specific aspects of the Carrier's operating plan. Rather, because this merger involves the complete integration of the MGA into Conrail, the totality of the circumstances compel a total abrogation of the MGA agreement. Stated differently, it is impossible to accommodate the transaction by amending a few rules in the MGA agreement. Retaining even a residue of the MGA agreement will impede the impending transaction since the agreement, in and of itself, would maintain the MGA as a separate railroad property which is anathema to the complete integration of operations.

Conrail is the controlling Carrier in the merger and thus, it is most appropriate to place MGA Engineers under the Agreement applicable to Locomotive Engineers on Conrail. Southern Railway-Purchase-Illinois Central Railroad Line, 5 I.C.C. 2d 842 (1989). Complete integration of train operations makes it unwieldy for MGA Engineers to carry any portion of the MGA agreement with them to Conrail. Imposing multiple agreements on the former MGA territory would render the coordination not just awkward but would thwart the transaction.

The Conrail agreement governing Conrail's Engineers differs from the MGA agreement. The Organization asserts that the level of total compensation in the Conrail agreement is below the level of total earnings accruing to Engineers under the MGA agreement. Assuming that the Organization's monetary calculations are correct, the ICC imposed the New York Dock Conditions on the Carriers for the specific purpose of protecting employees who suffer a wage loss as a result of changes in operations stemming for the merger. The amount of compensation which MGA Engineers are currently receiving will be included in their test period average earnings. Subsequent to the introduction of consolidated operations, if a former MGA Engineer does not earn compensation equivalent to the Engineer's test period average, because of a merger related change in operations, the Engineer will be afforded a displacement allowance in accord with Section 5 of the New York Dock Conditions. In conclusion, the protective provisions of the New York Conditions are designed to protect employees from being placed in a worse position with respect to their compensation.

To reiterate, this Arbitrator has the authority, under Section 4 of the New York Dock Conditions, to determine which schedule agreement will apply to MGA Engineers following the coordination and, the Arbitrator rules that, the MGA Engineers must be placed under the collective bargaining agreements applicable to Locomotive Engineers and Reserve Engine Service Employees on Conrail.

AWARD AND ORDER

1. The answer to the first stipulated issue in dispute is Yes.

2. The answer to the second stipulated issue in dispute is the collective bargaining agreements governing rates of pay and working conditions of Locomotive Engineers and Reserve Engine Service Employees on the Consolidated Rail Corporation.

Dated: October 29, 1992

John B. LaRocco
Arbitrator

JBL/dm
a:awards/conrail.utu

ATDA EXHIBIT H

ARBITRATION UNDER NEW YORK DOCK,

APPENDIX III, ARTICLE 1, SECTION 4

52

SEABOARD SYSTEM RAILROAD and AMERICAN TRAIN DISPATCHERS ASSOCIATION Re: Birmingham Train Dispatchers	ICC FINANCE DOCKET No. 30053

FINDINGS AND AWARD

HERBERT L. MARX, JR., REFEREE

APPEARANCES

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R. J. Irwin, Vice President

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F I N D I N G S

This is an arbitration proceeding pursuant to the provisions of the New York Dock Labor Protective Conditions (under Appendix III, Article I, Section 4) imposed by the Interstate Commerce Commission in Finance Docket Number 30053.

The dispute involves the announced intention of the Seaboard System Railroad (the "Carrier") to coordinate, transfer and/or reassign certain train dispatching functions performed by employees represented by the American Train Dispatchers Association (the "Organization") from offices in Birmingham, Alabama, to offices in Atlanta, Georgia; Bruceton, Tennessee; Jacksonville, Florida; and Mobile, Alabama.

Written notice of such proposed changes was sent to appropriate Organization officials by letter dated October 22, 1984. Under date of November 10, 1984, the Organization responded, requesting resolution of a number of questions raised by the proposed move. The parties met to discuss the matter on November 13, 1984, at which time the Carrier presented a proposed Implementing Agreement to the

Organization. Discussions continued on November 14 and 29, 1984. When no accord was reached, the Carrier served notice by letter dated December 20, 1984, of its intention to invoke the arbitration provisions set forth in Appendix III, Article I, Section 4 of New York Dock. As a result, the Referee was selected by the parties to hear and resolve the dispute. Hearing was held in Jacksonville, Florida on January 17, 1985. The parties were given full opportunity to present oral and written argument.

As arranged at the hearing, the parties filed post-hearing summaries, which were received by the Arbitrator on January 29, 1985. The Arbitrator also received on February 11, 1985 a letter from the Carrier "taking exception" to portions of the Organization's post-hearing summary.

The parties agreed to extend the time limit for submission of the Referee's Award to 30 days beyond receipt of the final document.

The Carrier's proposal for the "coordination, transfer and realignment of train dispatching territory" involves the abolishment of seven Train Dispatcher positions and the positions of Chief, Assistant Chief, Night Chief, and Relief Chief Dispatchers at Birmingham, as well as one dispatching position at Jacksonville. The Carrier proposes no addition to forces at the locations to which dispatching duties would be transferred from Birmingham. The proposed changes would assign various subdivisions to Train Dispatchers at other

locations; the Main Line Train Dispatchers would continue at present, with the Nashville Division Superintendent having jurisdiction of the line north of Birmingham and the Mobile Division Superintendent having jurisdiction over Birmingham and the line south of Birmingham.

Adequacy of the Notice

The Organization's initial position is that the Carrier's notice of October 22, 1984 should be dismissed, because it fails in several respects to meet the requirements mandated by Article I, Section 4 of New York Dock.

First, the Organization notes that the notice seeks to eliminate the position of Chief, Assistant Chief and Night Chief Dispatchers, "but does not provide for the transfer or other disposition of work presently performed by these positions". Second, the notice, according to the Organization, does not provide for the transfer or other disposition of work on the Sylacauga Subdivision. Third, the Organization alludes to an overall "restructuring program" of the CSX Corporation, of which Seaboard System Railroad is a part. The Organization argues that it is entitled to receive protection now for Train Dispatchers from the effects of further consolidations of which the Birmingham move is reported to be a part.

Article I, Section 4 of New York Dock reads in pertinent part as follows:

> 4. Notice and Agreement or Decision.-
> (a) Each railroad contemplating a transaction which is subject to these conditions and may cause

> the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. . . .

The Referee does not find that these allegations on the Organization's part are of sufficient weight for a finding that the Carrier has failed to make a "full and adequate statement of the proposed changes". As to the work of the Chief Dispatcher and others performing such work, the Carrier's notice spells out in four or five numbered paragraphs how train dispatching work will be assigned to other points. Another numbered paragraph (No. 6) indicates jurisdictional responsibility for Main Line Train Dispatchers remaining at Birmingham as being assigned to Superintendents of the Nashville and Mobile Superintendents. The work of a Chief Dispatcher can logically only have substance insofar as it relates to the amount of dispatching work at a location requiring a "Chief" function. The notice is clear on its face that the functions of the positions referred to by the Organization are to be disbursed as outlined by the Carrier to various other points, with no "Chief" function remaining at the much reduced Birmingham office.

As to reference to the trackage in the Sylacauga Subdivision, this appears to have been subject to recent reorganization. The parties have exchanged sufficient information as to which Division this Subdivision is a part. Clearly, any confusion about this does not affect the rearrangement of forces proposed by the Carrier.

The Organization, quite understandably, is concerned not only with each transaction affecting the employees it represents; it also wishes to know how such moves fit into longer range consolidation plans which the Carrier may have. Nevertheless, Section 4 (a) refers to contemplation of "a transaction" and requires a "full and adequate statement" about "such transaction" (emphasis added). The Carrier has met its obligation as to the Birmingham train dispatching move, even if information is not included about future transactions which may or may not now be in the planning stage and about which precise information may or may not now be known to the Carrier. The Organization is protected, of course, by the New York Dock requirement of further notice, discussion and, if necessary, arbitration of any further moves.

The Referee thus finds that the Carrier's notice of October 22, 1984 meets the requirement of Article I, Section 4. This leads to the determination of the terms of a resulting Implementing Agreement.

The Implementing Agreement

The Carrier and the Organization have provided each other and the Referee with proposed Implementing Agreements to cover this transaction.

Before selecting from among the terms proposed by the parties, the Referee notes both the extent and limitations of his authority as provided in Article I, Section 4. The operative second paragraph of this section reads as follows:

> Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. . . .

This provision refers to an agreement with respect to "application of the terms and conditions of this appendix". The cited "appendix" includes displacement, dismissal and separation allowances (Section 5, 6 and 7); maintenance of fringe benefits (Section 8); and moving expenses and loss from home removal (Sections 9 and 12). Separate from these is the requirement of an "agreement or decision" as to "the selection of forces from all employees involved on a basis

accepted as appropriate for application in the particular case". It will be these criteria which will guide the Referee in his formulation of an Implementing Agreement.

An analysis of the Carrier's proposed Agreement reveals the following: Paragraph 1 states that the New York Dock labor protective conditions "shall be applicable". In stating the obvious (see New York Dock Article I, Section 4), the Carrier also argues that the conditions should be as stated in New York Dock, without amendment or embellishment. Paragraphs 2 through 7 describe the revised assignment of dispatching work, concerning which there appears to be no reason to dispute the Carrier's determinations. Paragraph 8 describes the classifications and, to some degree, the responsibility of Train Dispatchers remaining at Birmingham. Paragraph 9 refers to "former SCL Train Dispatchers" who transferred to Birmingham and states that they "will be required" to exercise Clerk seniority if they do not stand for a Train Dispatch position. Paragraphs 10-13 are general provisions, on which comment will be made below.

The Organization's proposed Implementing Agreement consists of two Articles. Article I concerns "Changes To Be Effected" and duplicates provisions of the Carrier's proposed Agreement. Article II concerns "Terms and Conditions" which, for the purposes of the Referee's findings, may be analyzed in the following manner (numbers referring to the Sections of Article II):

General Definitions:

1. Definition of displaced and dismissed employees
2. Definition of change of residence
23. Selection of choice of protective benefits and conditions
24. Test period information and filing of claims

Seniority Rights:

3. Exercise of seniority
19. Duration of seniority rights
20. Displacement rights in other crafts

Benefits and Conditions of Employment

4. Vacation and sick leave benefits
5. Qualifying time
6 through 10. Transfer and relocation costs and conditions
17. Extension of sick leave benefits
18. Improvement of expense allowance
21. Separation allowances

Establishment of New Positions

11. through 16. Creation of additional positions
22. Guaranteed Assigned Train Dispatcher positions

Consideration now turns to which of these proposed provisions should be included in the Implementing Agreement. These will be addressed under the categories adopted above by the Referee.

Establishment of New Positions

The Carrier's formal notice to the Organization on October 22, 1984 specified the abolishment of 11 positions at Birmingham and one at Jacksonville. In detailing the transfer of responsibilities to other locations, the Carrier gave no indication of the establishment of comparable new positions. Sections 11-16 of the Organization's proposal would establish new positions in Birmingham and at other locations. Under these Section 4 New York Dock proceedings, there is no mandate provided to permit the Referee to direct the Carrier to maintain or establish a work force of particular size or description. While the "selection of forces" is at the heart of the Referee's jurisdiction, this must necessarily be accomplished after determination by the Carrier as to the size of the work force it deems necessary. Thus, the Referee has no grounds to consider the Organization's suggestion as to the addition of positions. The Carrier posits a coordination of work which it believes can be accomplished by abolishing 12 positions. Should it be found that the realignment requires additional positions to accomplish the work as rearranged by the Carrier, the

Organization then indeed has a vital concern in reference to the rights to such positions of employees whose postions were abolished in the transaction. This, however, is a separate matter, to be reviewed below.

Benefits and Conditions of Employment

As cited above, a number of the Organization's proposals would expand on conditions specifically set by New York Dock. This is particularly true of the Organization's proposed Sections 6 through 10, which would set conditions for employees who may transfer to a new point of employment. Conditions for such transfers are covered in Article I, Sections 9 and 12 of New York Dock. The Carrier may do no less than is provided in Sections 9 and 12. The jurisdiction of the Referee does not extend, however, to providing for the expansion of such relocation benefits as are sought by the Organization. This position is supported by other similar recent arbitration proceedings. In an Oregon Short Line III proceedings (comparable to New York Dock proceedings), Referee Richard Kasher stated as follows (in Illinois Central Gulf-United Transportation Union, December 19, 1980):

> The levels of benefits have been established by the Appendix. The implementing agreement properly deals with the means by which such levels are to be afforded, but may not raise or lower them unless the parties have so agreed.

Section 17 seeks added sick leave and supplemental sickness benefits for certain Train Dispatchers, and Section 18 seeks a substantially increased allowance for Extra Train Dispatcher expenses. Based on the reasoning outlined above, such changes are beyond the jurisdiction of the Referee to consider. Similarly, Section 21 seeks formulas for separation allowances which subject is covered in New York Dock Article I, Section 7, and requires no embellishment here.

There are, however, two Organization proposals in this general category which the Referee finds fully appropriate for the Implementing Agreement. The first is Section 4, which seeks to clarify the retention (not expansion) of vacation and sick leave benefits for displaced Train Dispatchers. This is entirely consonant with New York Dock Article I, Section 8, which protects employees affected by a transaction from being deprived of "benefits attached to his previous employment".

Likewise, Section 5 proposes a means of providing conditions for qualifying on unfamiliar territory, which may be necessary as a result of the transaction. The Organization states without contradiction that these proposed conditions are identical to those in a previous similar agreement. As part of the "selection of forces", the Referee finds this proposal appropriate for inclusion in the Implementing Agreement.

General Definitions

Sections 1, 12, 23, and 24 of the Organization's proposals do not seem to be at serious variance with the somewhat briefer references to the same subjects in the Carrier's proposal. An exception appears to be the Organization's specification that "change in residence" means a new work location more than 30 miles from the employees current work location. Another may be the Organization's proposal, in Section 24 (b) of the precise means for settling disputes in reference to claims for displacement or dismissal allowances. The Award will direct the parties to coordinate these Sections of the Organization's proposals with those of the Carrier's proposal, provided, however, that if such agreement is not promptly achieved, the reference to 30 miles will not be included and the claim adjustment procedure recommended by the Organization will be included.

Seniority Rights

Since the Carrier starts with the assumption of abolishment of positions without the creation of new positions elsewhere, the Carrier's Implementing Agreement makes no provisions of "selection of forces". The Organization understandably challenges such assumption. As stated above, the Referee has no basis on which to impose new positions on the Carrier. In pursuance of the purposes of Article I, Section 4, however, it is entirely

proper to provide for the protection of seniority rights of Birmingham Train Dispatchers in the event that the rearrangement of work does lead to new Train Dispatcher work opportunities in the locations where the work is assigned. Thus, the Referee finds that the proposed provision in Section 3 (b) of the Organization's proposal to be appropriate, with the limitation that it shall apply only during the protective period for the Train Dispatchers.

Support for this view is found in Referee Jacob Seidenberg's Award in Baltimore & Ohio, etc. and Brotherhood of Maintenance of Way Employees, etc. (ICC Finance Docket No. 30095, August 31, 1983), in which it is stated:

> While it is unquestioned that the B&O has the sole discretion to determine the size of the work force it wants to use from N&SS forces, no Neutral can prescribe the size of the work force that must be utilized. However, this does not mean that the B&O can, or should be permitted, unilaterally to extinguish the vested seniority and pension rights of inactive N&SS employees. The B&O intends to operate on N&SS property and it is inappropriate for the B&O to take action that would cause the N&SS to lose permanently their recall rights to work on N&SS territory, if the exigencies of operations should warrant such a happy state. We find the B&O's amended proposal to hire inactive N&SS employees as new B&O employees, is not a satisfactory resolution of this problem.

Section 3 (a) and (c) are not required, since they involve conditions already adequately covered in New York Dock itself.

Section 19 of the Organization's proposal seeks protection of the "duration of . . . employment" goes well beyond the protective period prescribed by New York Dock

and is thus inappropriate. Likewise, displacement rights in another craft, covered in the Organization's Section 20, is not required, since wage protection rights are fully covered in New York Dock itself.

Carrier's Proposed Agreement

Section 13 of the Carrier's proposal refers to possible "conflict" in the Implementing Agreement and "currently effective working agreements". Without knowledge as to what such "conflict" might be, the Referee finds it inappropriate to include this provision within the jurisdictional limit of New York Dock Article I, Section 4.

* * * * *

The Referee places great emphasis on the desirability of Implementing Agreements such as this to be arrived at insofar as possible by negotiations between the parties rather than by the ultimate binding authority of an arbitration award. The Referee also is aware of the Carrier's understandable need to move forward with the transaction as expeditiously as possible. The Referee will therefore prescribe a further period limited to 15 days during which the parties may make any further adjustments in the Agreement by mutual accommodation. Should such opportunity prove unnecessary or lead to no accommodation, then the Implementing Award will, of course, become effective as stated by the Referee.

A W A R D

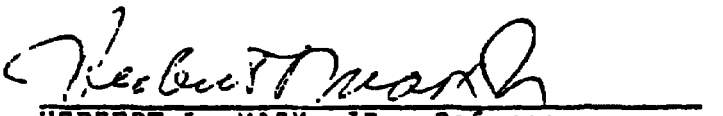
The Implementing Award between the Carrier and the Organization in reference to the Train Dispatcher functions at Birmingham shall be as follows:

1. The "Memorandum of Agreement" proposed by the Carrier (Carrier Exhibit D) shall be adopted, except for Section 13.

2. Sections 1, 2, 23, 24 of Article II of the Organization's proposed "arbitrated Implementing Agreement" shall be coordinated with the appropriate sections of the Carrier's proposal, in the manner prescribed in the Findings.

3. Section 3 (b) (limited to the protection period) and Sections 4 and 5 of Article II of the Organization's proposed agreement shall be appropriately numbered and adopted as part of the Implementing Agreement.

4. Within 15 days of the receipt of this Award, or upon a mutually agreed later date, the parties shall meet for the purposes of carrying out Paragraph 2 of the Award and to make any other adjustments in the terms of the Implementing Agreement which may be reached at such meeting. Failure to agree at such meeting on any adjustments will make the Award final as specified in Paragraphs 1 through 3 above.



HERBERT L. MARK, JR., Referee

New York, N. Y.

Dated: March 7, 1985

ATDA EXHIBIT I

Agreement between

DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY (DMIR)
CANADIAN NATIONAL RAILWAY COMPANY (CN)
WISCONSIN CENTRAL TRANSPORTATION CORPORATION ("WCTC")

and their employees represented by

AMERICAN TRAIN DISPATCHERS ASSOCIATION (ATDA)

WHEREAS, the Surface Transportation Board, in a Decision dated September 5, 2001 (STB Finance Docket No. 34000), and April 9, 2004, (Finance Docket No, 34424), approved the acquisition by Canadian National Railway Company ("CN") of the Wisconsin Central Transportation Corporation ("WCTC") and Duluth, Missabe and Iron Range Railway Company ("DMIR") respectively, subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on June 7, 2004 the DMIR, WCTC, and CN served notice under Article I, Section 4 of the Protective Conditions of its intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the DMIR, WCTC, CN and the American Train Dispatchers Association ("ATDA") on behalf of employees represented by the ATDA, establishes procedures for the transfer of work and employees whose positions will be abolished on the DMIR.

IT IS AGREED:

1. CN will provide a minimum of twenty (20) days notice at Keenan for six (6) management dispatcher positions at Stevens Point and three (3) separation allowances of ninety thousand

dollars ($90,000), subject to applicable payroll deductions. Upon the transfer of the DM&IR dispatching territory to Stevens Point to the newly established management dispatcher positions, the DM&IR dispatching position losing the territory will be abolished. Should CN not transfer all of the territory being dispatched in Keenan, or abolish all train dispatcher positions (Chief, Assistant Chief and/or Trick) at Keenan, any remaining dispatcher on the DMIR shall remain covered by the ATDA agreement with representation rights unaffected by this implementing agreement.

2. A successful applicant for a separation allowance may choose one of the following options:

   (a) Accept a lump sum separation allowance of $90,000, less applicable withholding taxes. The separation allowance will be paid on the employee's last paycheck, at which time the employee's position will be abolished and the employee's employment relationship with the company will terminate.

   (b) Accept a dismissal allowance to be paid over a period of time, designated by the employee, not to exceed thirty-six (36) months. The gross amount of the dismissal allowance will be $90,000 less $1,000 per month for each month of the dismissal allowance. The dismissal allowance will be paid in equal increments on the first pay period of each of the months for the duration of the dismissal allowance, at which time the employee's position will be abolished and the employee's employment relationship with the company will terminate. Employees receiving a dismissal allowance in accordance with this paragraph will be entitled to Health & Welfare benefits in accordance with the DMIR/ATDA Agreement. Employees receiving a

dismissal allowance in accordance with this paragraph will not be entitled to any other benefits of the DMIR/ATDA Agreement.

(c) Any separation allowances will be paid within 1 month following the employee's last day of work.

3. DMIR Dispatchers must submit their application for the above options or state their intent to exercise any DMIR seniority that they may have, in writing, to the individual designated by the carrier, with copy to General Chairman, within ten (10) days from date of posting. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify sufficient options, will result in the employee being considered as having elected to exercise any existing DMIR seniority.

4. Assignments of positions and awarding of separations allowances shall be made in seniority order. In the event insufficient individuals elect to bid on positions at Stevens Point, the positions will be filled by force assignment of DMIR dispatchers in reverse seniority order, except for those individuals who are to receive a separation or dismissal allowance. Individuals, other than those receiving the separation allowances, who refuse such assignment will not be entitled to the benefits of this agreement.

5. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. Active and regularly assigned employees at Keenan failing to apply for a position pursuant to this agreement shall not be considered deprived of

employment and shall not be entitled to the protective benefits contained in the New York Dock conditions or any other protective agreement.

6. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.

7. Each "dismissed employee" shall provide the carrier's designated individual the following information for the preceding month in which such employee is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the carrier

    a. The day(s) claimed by such employee under any unemployment insurance act.

    b. The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer(s) and the gross earnings made by the dismissed employee in such other employment.

    c. The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and the employee received sickness benefits.

8. If the "dismissed employee" referred to herein has nothing to report account not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for work the entire month, such employee shall submit, on a form provided by the carrier, within the time period provided for in Paragraph 7, the form annotated "Nothing to Report."

9. The failure of any employee to provide the information as required in paragraphs 7 and 8 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the carrier of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in paragraph 7, except in circumstances beyond the individual's control.

10. The carrier will make payment of the protective benefits within thirty (30) days of receipt and verification of the information required in paragraphs 7 and 8.

11. Employees transferred from Keenan to Stevens Point under provisions of this agreement may at their option and in lieu of any and all benefits provided by Sections 9 and 12 of the New York Dock conditions (Attachment "A"), be afforded a special payment as provided in Attachment "B", if eligible, or accept the company's management relocation package.

12. Employees transferring from Keenan to Stevens Point pursuant to this agreement shall forfeit all DMIR seniority, become WCTC management employees, and be credited with prior DMIR service on the WCTC for vacation purposes.

13. In accordance with the organization's request a copy of this Implementing Agreement with attachments will be provided to all the Dispatchers at Keenan.

14. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of June 7, 2004.

15. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the appropriate General Chairman with the officer designated to receive such claims and grievances for the carrier. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.

16. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.

17. This Agreement shall be effective this 6th day of May, 2005.

Signed this 6th day of May, 2005 at Homewood, Illinois.

For
DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY (DMIR)
CANADIAN NATIONAL RAILWAY COMPANY (CN)

For

AMERICAN TRAIN DISPATCHERS ASSOCIATION (ATDA)

ATTACHMENT A

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. Definitions. – (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collecting bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job

security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision – (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances – (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. – (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earning of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place or residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad in active service or on furlough as the case may be, to the extent that such benefits can

be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. - . Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representative; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses where incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes. – (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. – (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence;

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be grated priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or re-training physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or re-training is requested by such employee, the railroad shall provide for such training or re-training at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ATTACHMENT B

In lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions, employees who accept positions at Stevens Point may elect, at the time of their transfer, to accept the following payments subject to taxation:

All DMIR Employees who transfer to Stevens Point:

After fifteen (15) working days	$2,000
After sixty (60) working days	$1,000
After six (6) months	$2,000
After one (1) year	$1,000
After fifteen (15) months	$2,000

To qualify for the above payments, an employee must be in active service at Stevens Point at the time such payment is due.

DMIR Employees who relocate their primary residence:

DMIR employees who relocate their primary residence and select the benefits of this Attachment at the time of their transfer will be entitled to an additional $10,000 upon proof of sale, at fair market value, of their primary residence in the Keenan area, and proof of purchase of a new primary residence within a reasonable distance of Stevens Point. To qualify for the benefits of this paragraph, relocation of primary residence, including both sale and purchase, must occur within two (2) years of the date of transfer.

May 6, 2005

Side Letter No. 1

Mr. Craig A. McNeil
General Chairman
American Train Dispatchers Association
2023 Allegheny Street
Duluth, MN 55811-3207

Dear Mr. McNeil:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the Duluth, Missabe and Iron Range (DMIR) to Stevens Point, Wisconsin.

It was agreed that DMIR employees, who do not choose the CN Management Relocation package, may elect to receive a one-time lump sum payment of one thousand dollars ($1,000) to offset the costs associated with a familiarization/house hunting trip to the Stevens Point area. Employees electing the lump sum payment who do not relocate will have the one thousand dollars ($1,000) deducted from any future earnings or protective payments.

Yours truly,

C.K. Cortez
Manager – Labor Relations

May 6, 2005

Side Letter No. 2

Mr. Craig A. McNeil
General Chairman
American Train Dispatchers Association
2023 Allegheny Street
Duluth, MN 55811-3207

Dear Mr. McNeil:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the Duluth, Missabe and Iron Range (DMIR) to Stevens Point, Wisconsin.

During our negotiations, we agreed that representatives of the company will meet with representatives of the union, within sixty (60) days of the effective of the agreement in an effort to resolve which employees, if any, are considered "dismissed" or "displaced" in accordance with the provisions of the New York Dock protective conditions.

The representatives will also establish a procedure to resolve any differences resulting from the Implementing Agreement.

Yours truly,

C.K. Cortez
Manager – Labor Relations

May 6, 2005

Side Letter No. 3

Mr. Craig A. McNeil
General Chairman
American Train Dispatchers Association
2023 Allegheny Street
Duluth, MN 55811-3207

Dear Mr. McNeil:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the Duluth, Missabe and Iron Range (DMIR) to Stevens Point, Wisconsin.

During our negotiations, we agreed that any DMIR employees who transfer and become Wisconsin Central employees, as a result of the Implementing Agreement of this date, will be paid for any unused Personal Leave Days for the calendar year at the time of transfer.

Yours truly,

C.K. Cortez
Manager – Labor Relations

May 6, 2005

Side Letter No. 4

Mr. Craig A. McNeil
General Chairman
American Train Dispatchers Association
2023 Allegheny Street
Duluth, MN 55811-3207

Dear Mr. McNeil:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the Duluth, Missabe and Iron Range (DMIR) to Stevens Point, Wisconsin.

During our negotiations, we agreed that it may be possible that DMIR employees who transfer and become a Wisconsin Central employee, as a result of the Implementing Agreement of this date, may be entitled to the benefits of the New York Dock protective conditions.

Yours truly,

C.K. Cortez
Manager – Labor Relations

May 6, 2005

Side Letter No. 5

Mr. Craig A. McNeil
General Chairman
American Train Dispatchers Association
2023 Allegheny Street
Duluth, MN 55811-3207

Dear Mr. McNeil:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the Duluth, Missabe and Iron Range (DMIR) to Stevens Point, Wisconsin.

During our negotiations, we agreed that any DMIR employees who transfer and become a Wisconsin Central employee, as a result of the Implementing Agreement of this date, will be allowed to elect to receive payment of accumulated sick days at the time of transfer or retirement. Such election must be made in writing to the designated carrier official with a copy to the General Chairman.

Yours truly,

C.K. Cortez
Manager – Labor Relations

May 6, 2005

Side Letter No. 6

Mr. Craig A. McNeil
General Chairman
American Train Dispatchers Association
2023 Allegheny Street
Duluth, MN 55811-3207

Dear Mr. McNeil:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the Duluth, Missabe and Iron Range (DMIR) to Stevens Point, Wisconsin.

During our negotiations, you asked what adverse affect, if any, an employee who had a pre-existing condition would suffer if they came into the WCTC Management Health & Welfare Plan. This is to advise that the WCTC Management Health & Welfare Plan has 1st day coverage without exclusion.

Yours truly,

C.K. Cortez
Manager – Labor Relations

ATDA EXHIBIT J

CSX TRANSPORTATION
Labor Relations Department

500 Water Street
Jacksonville, FL 32202

January 9, 1988

File: G-125 Dispatchers

Side Letter No. 3

Mr. Davey A. Black, General Chairman
American Train Dispatchers Assn.
Route 2, Box 98
Unicoi, Tennessee 37692

Mr. W. J. Priest, General Chairman
American Train Dispatchers Association
2025 Barkwood Court
Mobile, Alabama 36609

Mr. D. W. Branham, General Chairman
American Train Dispatchers Association
5943 Lynwood Court
Catlettsburg, Kentucky 41129

Mr. E. D. Rountree, General Chairman
American Train Dispatchers Association
311 Bonaventure Road
Thunderbolt, Georgia, 31404

Gentlemen:

This refers to Memorandum Agreement effective January 9, 1988, providing for the coordination and transfer of Train Dispatcher functions from locations covered by the L&N Agreement, Chessie Agreement, Seaboard Agreement, and Clinchfield Agreement to the newly centralized CSX Transportation Train Dispatching operation in Jacksonville, Florida.

The Carrier will offer separation allowances to regularly assigned Train Dispatchers in seniority order in all effected Train Dispatcher offices. The separation allowance will be a lump sum of $50,000 or one of the deferred payment options set forth in the severance plan previously given you during our recent conference in Jacksonville, Florida. Eligible employees who are 55 years of age, but less than 65, who are not otherwise eligible for coverage under Travelers Policy GA 46000 or under Medicare, will be granted, at Carrier expense, the same schedule of Early Retirement Major Medical Benefits as they would have received under Travelers Policy GA-46000, the same life insurance benefits as provided in Travelers Policy GA-23000. The number of separation allowances will be no more than an amount equal to the net reduction of Train Dispatcher positions contemplated by this Memorandum Agreement.

This understanding is without prejudice to the position of either party and will not be cited as a precident in the future.

It is understood and agreed that separations paid to employees desiring to leave the Company will be paid no later than when the dispatching office closes in the city where the employee is working.

If the foregoing confirms our understanding and agreement to this matter, please indicate in the space provided below.

Very truly yours,

R. P. Byers
Director of Labor Relations

General Chairman

General Chairman

General Chairman

General Chairman

cc: Mr. R. J. Irvin, President
American Train Dispatchers Association
1401 South Harlem Avenue
Berwin, Illinois 60402

Mr. H. E. Mullinax, Vice President
American Train Dispatchers Association
911 Clarendon Avenue
Florence, South Carolina 29501

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